(1)
Supreme Court, U.S.
FILED
991441 FEB 25 2000
OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM 1999

DENNIS M. GUTENKAUF
DANIEL A. GUTENKAUF
PETITIONERS

v

MARICOPA COUNTY, ET AL.
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS M. GUTENKAUF*
DANIEL A. GUTENKAUF
c/o 1847 E. APACHE BLVD. #41
TEMPE, ARIZONA PZ 85281
(480) 966-7018

*PETITIONERS, IN PROPRIA PERSONA

10 PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether election workers refusal to allow the Petitioners their right to videotape matters of public interest, threats to have the voters removed from the polls, and knowing failure to do a public count of the votes cast violated First and Fourth Amendment rights ?

2. Whether a racial animus must be alleged in order to state a claim under 42 U.S.C. 1985(3) clauses 2,3, and 4, and ¶1986 ?

3. Whether Respondents were entitled to qualified immunity on the claim that the rights violated were not clearly established ?

4. Whether the state and county Defendants should be held liable for policies which exposed Petitioners to the deprivation of rights ?

THE PARTIES

Dennis M. Gutenkauf and
Daniel A. Gutenkauf
Plaintiffs in Pro Per

v

MARICOPA COUNTY, in its entirety a municipality duly incorporated under the laws of the State of Arizona; **JANE DEE HULL**, in her individual capacity;**TERRENCE HULL;LISA K. DANIEL**, in her individual capacity;**MARICOPA COUNTY BOARD OF SUPERVISORS:ED KING**, in his individual and official capacity;**TOM RAWLES**, in his individual and official capacity; **LINDA RAWLES; DON STAPLEY**, in his individual and official capacity, **JERRI L. STAPLEY; BETSEY BAYLESS**, in her individual and official capacity; **MARY ROSE WILCOX**, in her individual and official capacity,**EARL V. WILCOX; MARICOPA COUNTY ELECTIONS: KAREN OSBORNE**, in her individual and official capacity as Director of Elections;**LINDA WEEDON**, in her individual and official capacities as Assistant Director of County Elections, and Head of Elections Hotline; **HELEN PURCELL**, in her individual and official capacity as County Recorder **JOE R. PURCELL; MARICOPA COUNTY ELECTIONS HOTLINE: ROSE YERA**, in her individual and official capacity;**DORA RHODES**, in her individual and official capacity; **CHARLES E. RHODES;CAROL SCHLIEF**, in her individual and official capacity, **GEORGE H. SCHLIEF JR.; PATSY WOLFE**, in her individual and official capacity;

WILLARD GENTRY, in his individual and official capacity as Election Marshal, **DOROTHY GENTRY;ALLEN HARDING**,in his individual and official capacity as Elections Inspector **VIRGINIA HARDING**, in her individual and official capacity as Elections Judge; **ALBERT PADBERG**, in his individual and official capacity as Elections Judge;**JAMES PATRICK DELANEY JR.**,in hia individual and official capacity as Elections Clerk;**ALICIA VALENZUELA**, in her individual and official capicity as Elections Clerk; **SCOTT LIDDLE**, in his individual and official capacity as Troubleshooter, **HEATHER LIDDLE; LEROY BETTS**, in his individual and official capacity as police officer;**SHARON L. BETTS;RANDALL WILSON**, in his individual and official capacity as police officer; **LINDA WILSON; ELECTION TRAINING ADVISORY COMMITTEE: MARGARET J. STEARS**, in her individual capacity, **JAMES S. STEARS; SHARON R.KEENE-WRIGHT**, in her individual capacity, **HAROLD J. WRIGHT; ERYN McCARTHY**, in her individual capacity **PATRICIA L. WALL**, in her individual capacity; Defendants

TABLE OF CONTENTS

SUBJECT	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
THE PARTIES	ii
TABLE OF AUTHORITIES	vi
STATUTES AND REGULATIONS	viii
OPINION OF THE COURT BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE AND FACTS.....	2
REASONS FOR GRANTING WRIT	5
I.REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT HAS DECIDED IMPORTANT FIRST AND FOURTH AMENDMENT ISSUES IN CONFLICT WITH ITS OWN PREVIOUS DECISIONS IN *GREGORY* AND *FORDYCE*.....	5
II. THE NINTH CIRCUIT'S DECISION MISAPPLIES *GRIFFIN* AND CONFLICTS WITH THIS COURT'S DECISION IN *KUSH*. IT ALSO CONFLICTS ITS OWN PREVIOUS DECISIONS AS WELL AS THE EIGHTH AND THE TENTH CIRCUITS.....	6
III. THE SUPREME COURT HAS NOT HEARD AN ELECTIONS CASE INTERPRETING CLAUSE TWO OF 42 U.S.C. 1985(3).....	7

IV. BECAUSE A CLAIM WAS STATED UNDER 1985(3), THE 1986 CLAIM WAS IMPROPERLY DISMISSED.....9

V. THE NINTH CIRCUIT'S RULING ON SUMMARY JUDGMENT CONFLICTS WITH THIS COURT'S DECISIONS IN *SHEUER* AND *HAINES* 10

VI. QUALIFIED IMMUNITY FOR DEFENDANTS WAS DECIDED BY THE DISTRICT COURT AND UPHELD BY THE NINTH CIRCUIT IN A WAY THAT CONFLICTS WITH THIS COURT'S RULING IN *ANDERSON* AND *MALLEY*.....11

VII. THE NINTH CIRCUIT'S MISAPPLICATION OF CASE LAW, DEPARTURE FROM ESTABLISHED PROCEDURES, AND CONFLICTING RULINGS CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.....14

VIII. THE NINTH CIRCUIT'S RULING IS IN CONFLICT WITH THIS COURT'S DECISION IN *MONELL*.....15

IX. THE ISSUES PRESENTED ARE IMPORTANT TO THE PUBLIC AT LARGE, NOT JUST THE PETITIONERS.....16

CONCLUSION 17

TABLE OF AUTHORITIES

CITATION **PAGE**

Allen v State Board of Elections
393 U.S. 544 (1969).....12

Anderson v Creighton
483 U.S. 635 (1987).....11

Averyt v Williams 8 Ariz. 355
(1904).....13

Bretz v Kelman 773 F.2d 1026
(9th Cir. 1985).....7

Button v Nevin 44 Ariz. 247,
36 P.2d 568 (1934).....13

Carlson v Pima 141 Ariz. 487,
687 P.2d 1242 (1984).....13

Fordyce v City of Seattle
55 F3d 436 (9th Cir, 1995),,,,,,,5,6,15

Gamza v Aguirre 619 F.2d 449 (1980)..14

Graham v Clusen 427 F.Supp. 820
(Dist. Ct. D.C. 1977.....7

Gregory v Thompson 500 F.2d 59
(9th Cir. 1974).....5,6

Green v Osborne 157 Ariz. 363
(1988).....17

Griffin v Breckenridge 403 U.S. 88,
(1971.....6

Haines v Kerner 404 U.S.519 (1972)....10

Harlow v Fitzgerald 457 U.S. 800, (1982).....14

Kush v Rutledge 460 U.S. 719, (1983).....6,9

Lamar v Micou 114 U.S. 218, (1885).....12

Lovell v Poway Unified School Dist. 90 F.3d 367 (9th Cir. 1966) 8,9

Mack v South Bay Beer Distributors, Inc. 798 F.2d 1279 (9th Cir. 1986)..... .15

Malley v Briggs 475 U.S. 335, (1986).....13

Matsushita Elec. Co. v Zenith Radio Corp. 475 U.S. 574 (1986).....10

Miller v Picacho Elementary Dist. No, 33 179 Ariz.178 (1994).....13

Mollnow v Carlton 716 F.2d 627 (9th Cir. 1983).....7

Monell v Dept. of Social Servs. 436 U.S. 658 (1978).....15

Neely v St.Paul Fire & Marine Ins. Co. 584 F.2d 341 (9th Cir. 1978).....10,11

Noll v Carlson 809 F.2d 1446 (9th Cir. 1987) 10

Robeson v Fanelli 94 F. Supp. 62 (D.NY. 1950).....9

Santistevan v Loveridge 732 F.2d 116 (10th Cir. 1984).....7

Sheurer v Rhodes 416 U.S.232, (1974).....10

Smith v Ross 482 F.2d 33 (6th Cir. 1973).....9

Ting v U.S. 927 F.2d 1054 (9th Cir. 1991) 16

U.S. v Baldridge 11 F. 552 (Circuit Court N.D. Alabama 1882).....13

United States v Classic 313 U.S.299, (1941).....12,13

United States v Cooper 462 F.2d 1343 (5th Cir. 1972).....7

United States v Mosley 238 U.S. 383, (1915).....11

United States v. Olinger 759 F.2d 1293 (7th Cir. 1985)..... .12

Ward v County of San Diego 791 F.2d 1329 (9th Cir. 1986) 11

Wayne v Venable 200 F. 64 (8th Cir. 1919).....9

Wilkins v United States 376 F.2d 552 (5th Cir. 1967).....12

Wesberry v Sanders 376 U.S. 1 (1964).....16

Wisdom v Dept. of Housing and Urban Dev. 713 F.2d 422 (8th Cir.(1983).....7

STATUTES

SECTION	PAGE
28 U.S.C. 1331	1
28 U.S.C. 1343(a)1-4	1
28 U.S.C. 1367	1
28 U.S.C. ¶1254(1)	1.
28 U.S.C. 1291	1.
42 U.S.C. ¶1983	,1,3,8,15
42 U.S.C. 1985(3)	1,3,6,7,9
42 U.S.C. 1986	1,3,10
A.R.S. 12-821	1
A.R.S. ¶16-407 C	4
A.R.S. ¶16-601	1,6,12,14
A.R.S. ¶16-1013 (A)	9
A.R.S. ¶38-446	12

CONSTITUTIONAL PROVISIONS

Article 1, Sec. 2 & 4	12
First Amendment	3,5,6,16
Fourth Amendment	3,5
Fourteenth Amendment	3,12

PAGE LEFT BLANK

The Petitioners, Dennis M. Gutenkauf and Daniel A. Gutenkauf hereby Petition this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on November 30, 1999

OPINION OF THE COURT BELOW

The decisions of the District Court and Ninth Circuit Court of Appeals are unpublished and are in Appendix A.

JURISDICTION

The district court had jurisdiction pursuant to 42 U.S.C. ¶¶1983, 1985(3), and 1986, 28 U.S.C. 1331, 28 U.S.C. 1343 (a) 1-4, and state pendent jurisdiction under 28 U.S.C.1367 and A.R.S. 12-821.

The Ninth Circuit had jurisdiction of the final judgment of the district court pursuant to 28 U.S.C. ¶1291.

The Ninth Circuit Court of Appeals entered its judgment on November 30, 1999 affirming the District Court's judgment.(App., Pg. A-1)

The jurisdiction for this Court to review the judgment of the Ninth Circuit Court of Appeals by writ of certiorari is invoked under the provisions of 28 U.S.C. ¶1254(1) and Supreme Court Rule 10.

STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are involved in this case. The text of each provision is found in appendix B.

STATEMENT OF THE CASE AND FACTS

1. This case arises from the assault and intimidation of voters during the 1996 Presidential election. Dan Gutenkauf told election workers he was a Buchanan supporter, and was concerned about voter fraud. The Gutenkaufs wanted to monitor and videotape the precinct vote tally, when the polls closed, to ensure that their votes were honestly counted.
2. The Gutenkaufs gave election workers memorandum of A.R.S.16-601 (vote tally) and Attorney General Opinion No. 64-60-L, and the public records statute.
3. The election inspector was unsure of the voters' right to be present for the vote tally, and called the Tempe police. When the police and troubleshooter arrived, Dan Gutenkauf read them the public records statute, A.R.S. 16-601 (tally of vote), and Attorney General Opinion 64-40-L,
4. The troubleshooter said he didn't care about the Attorney General Opinion, and gave no credence to A.R.S.16-601. When Dan Gutenkauf asked permisson to videotape the vote count, the troubleshooter said: "They don't count anything here.....sounds like media to me."
5. The troubleshooter called the election hotline, who ordered the Plaintiffs to be removed. The trouble-shooter threatened to call the sheriff to remove the voters, who were peaceably assembled.
6. The Tempe police watched the assault, but did nothing to prevent it. The Gutenkaufs left out of fear of excessive force and false arrest. As

they left, Dennis Gutenkauf advised the troubleshooter that it's a class 6 felony to impair the availability of a public record. The election workers did not do a public count of the votes cast.
7. Dan Gutenkauf documented the incident on audio tape. As the Gutenkaufs left the polls, Tempe police officers Betts and Wilson detained the voters to make an incident report.
8. Petitioners filed a civil rights complaint under 42 USC 1983, 1985(3), and 1986 with a state pendant claim of assault. A jury trial was requested.
9. The complaint alleged denial of First, Fourth, and Fourteenth Amendment rights. (A-48.par.84) Before serving the complaint, it was amended to include additional defendants.
10. The complaint was dismissed for failure to state a claim upon which relief can be granted. The *pro se* Plaintiffs were **not allowed to amend the complaint** before dismissal.
11. The Plaintiffs were **denied discovery**. Summary judgment was granted to the Maricopa County defendants, even though the county attorney previously admitted on March 4, 1998 that there were **facts in dispute.**
12. The Plaintiffs' response raised issues of **witness credibility** to Maricopa County's summary judgment affidavits. Elections Director Karen Osborne's affidavit stated there was no duty to count votes at the precinct when the polls closed. Plaintiffs submitted Maricopa County's 1996 pre-election flyer, which states that **ballots <u>are</u> to counted when the polls close.** In a tour at the counting center, the Elections Director admitted (on tape) that ballots

are counted at the polls after closing. She also confirmed that when the polls are closed, they're open to the public. She admitted on tape that incidents similar to this case have happened before.

13 Another issue of **material fact in dispute** (raised in response to summary judgment) was whether election workers were trained in election law. While there was evidence of training in procedure, there was **no evidence of training in election law** as required by A.R.S.16-407 C.. This failure to train in election law was submitted as a theory of municipal liability.

14. In opposition to summary judgment, the Gutenkaufs submitted affidavits of voters, who were intimidated at the vote tally in other precincts. The affidavits showed Maricopa County's **policy of threatening and intimidating voters**,(See A-22)

15. There was no challenge by the defendants to the authenticity of the tape and transcript of the assault, yet the district court expressed a disbelief of the evidence. (A-14)

16. The Ninth Circuit Court of Appeals affirmed the district court's dismissal of the complaint, before the Plaintiffs could reply to new evidence submitted by Maricopa County supporting summary judgment.

REASONS FOR GRANTING WRIT

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT HAS DECIDED IMPORTANT FIRST AND FOURTH AMENDENT ISSUES IN CONFLICT WITH ITS OWN PREVIOUS DECISIONS IN *GREGORY* AND *FORDYCE*.

The Ninth Circuit's previous decision in *Gregory v Thompson* 500 F.2d 59 (9th Cir. 1974) held that the right violated by an assault is the right to be secure in one's person, and ¶1983 provides a remedy for a victim of assault. The Petitioners alleged facts in the amended complaint (A-39. par. 36-39) that they were assaulted by the elections troubleshooter. Yet, in the instant case, the Ninth Cicuit concluded that Petitioners failed to state a claim Therefore, the Ninth Circuit's ruling is in conflict with its previous decision in *Gregory*.

The Ninth Circuit has previously ruled that videotaping matters of public interest is a right protected by the First Amendment. See *Fordyce v City of Seattle* 55 F3d 436 (9th Cir. 1995). The Petitioners alleged facts in the amended complaint (A-39, par.33-35) that they were denied the right to monitor and videotape the vote count. The Petitioner's First and Fourth Amendment rights were denied without any state's compelling interest enunciated by the Defendants. (A-41, par. 49)

The District Court ***admitted*** in the order on (pg. A-8) that Election Marshal Alan Harding "refused to allow the brothers to videotape the vote count."

Yet, the district court and Ninth Circuit ruled that the Petitioners failed to state a claim.

In *Fordyce,* the Ninth Circuit reversed and remanded, since there was an issue of material fact as to whether Fordyce was assaulted by a policeman in an attempt to deny the First Amendment right to film matters of public interest.

The plain terms of A.R.S. ¶16-601 clearly show that the vote tally is a matter of public interest. The statute provides: "the count shall be ***public.***" The adjective "public"is defined as "Belonging to the entire community. Unrestricted in participation." *Ballentine's Law Dictionary* 3rd Ed.

Therefore, the Ninth Circuit's ruling (that the Petitioners did not state a claim) is clearly in conflict with it's previous decisions in *Gregory* and *Fordyce*. This conflict needs to be resolved by this Court.

II. NINTH CIRCUIT'S DECISION MISAPPLIES *GRIFFIN* AND CONFLICTS WITH THIS COURT'S DECISION IN *KUSH*. IT ALSO CONFLICTS WITH ITS OWN PREVIOUS DECISIONS, AS WELL AS THE EIGHTH AND TENTH CIRCUITS.

In *Griffin v Breckenridge* 403 U.S. 88, (1971) this Court held that a plaintiff must allege a class based animus in order to state a claim under 1985(3). While this is true of the first clause of 1985(3), the Ninth circuit has erroneously extended this doctrine to the second clause of 1985(3), dealing with federal elections. This ruling conflicts with this Court's decision in *Kush v Rutledge* 460 U.S. 719 (1983),

which held that the second portion of ¶1985(3) does not require that conspirators act with the intent to deprive their victims of equal protection.

In the instant case, the Ninth Circuit's decision is in direct conflict with it's own ruling in *Mollnow v Carlton* 716 F.2d 627, 630 (9th Cir. 1983) There is no suggestion (in *Griffin*) that its reasoning applies.... to the portions of the statute that prohibit interference with federal officers, federal courts, or federal elections (the second part of ¶1985(3)). See *Bretz v Kelman* 773 F.2d 1026, 1028 (9th Cir. 1985) A Court of Appeals is bound by prior decisions of its own circuit. *United States v Cooper* 462 F2d 1343 (5th Cir. 1972)

The Ninth Circuit's ruling in the instant case is also in conflict with the Eighth and Tenth Circuits. See *Wisdom v Dept. of Housing and Urban Development* 713 F.2d 422 (8th Cir. 1983); *Santistevan v Loveridge* 732 F.2d 116, 119 (10th Cir. 1984). Therefore, the writ should be granted to resolve the conflict with this Court and the conflict with other circuits.

III. THE SUPREME COURT HAS NOT HEARD AN ELECTIONS CASE INTERPRETING CLAUSE 2 OF 1985(3)

The only actual elections case interpreting the second clause of 1985(3) is *Graham v Clusen* 427 F. Supp. 820 (District Court D.C. 1977), That case held that to establish liability the plaintiff must plead and prove that certain persons have conspired to

"prevent by force, intimidation, or threat" from lawfully exercising his voting rights in a Presidential election.

The Petitioners have made such allegations in the amended complaint (A-41, par. 51-54) that Scott Liddle threatened to call the sheriff and have the voters removed from the polling place. This was proved the tape and the transcript of the November 5, 1996 incident. The complaint further alleges that the elections hotline is liable for the assault, because of its participation, by approving and ordering the decision to have the voters removed. Yet, the Ninth Circuit ruled that the Petitioners did not state a claim.

The order of the district court asserts (A-25) that "the key in stating a claim is that the state actor ***intended*** to interfere with the exercise of a constitutionally protected right." (***Emphasis added***) The Petitioners did so in the amended complaint (A-48, par.79-84) by alleging a conspiracy to ***intentionally*** deprive them of their rights to access public records and observe the vote count. Therefore, by the court's own standard, the Petitioners have stated a claim.

The order of the district court asserts (A-18) that "in order to state a claim under ¶1983, a plaintiff must allege facts establishing that the violation of state law ***resulted*** in the deprivation of Constitutionally protected rights, citing *Lovell v Poway Unified School Dist.* 90 F.3d 367, 370 (9th Cir.1966). The Petitioners did so in the amended complaint (A-46, Par. 74) by alleging: "Scott Liddle and the

elections hotline knew or should have known that it is a violation of A.R.S. ¶16-1013 (A) to threaten or intimidate a voter, and that doing so would ***result in the deprivation of Constitutionally protected rights."*** ***(Emphasis added)*** Therefore, by the the Ninth Circuit's own decision in *Lovell*, the Petitioners have stated a claim.

The Ninth Circuit's decision is in conflict with 8th Circuit ruling in *Wayne v Venable* 200 F. 64 (8th Cir.1919) which held that an action for damages in federal court lies by a qualified voter for deprivation of his right to vote for a member of Congress by a conspiracy of several defendants.

To date, the Petitioners' thorough research of *Kush* has not revealed any elections case decided by the Supreme Court interpreting clause 2 of 1985(3). The Ninth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be decided by this Court.

IV. SINCE CLAIM WAS STATED UNDER 1985(3) THE ¶1986 CLAIM WAS IMPROPERLY DISMISSED

In the instant case, police officers Betts and Wilson were present at the time of the assault, and knew of the voters' right of peaceable assembly for the vote tally. Yet, the officers failed to take any action to prevent the conspiracy. The case of *Smith v Ross* 482 F.2d 33 (6th Cir.1973) held that a police officer can be liable under a civil rights statute when by his inaction, he fails to perform a duty to enforce the law equally and fairly. In *Robeson v Fanelli* 94 F. Supp. 62 (D.

NY. 1950) the plaintiffs stated a claim when officers knew of a conspiracy to prevent discussion of legal issues, but did not prevent the conspiracy. Therefore, the 1986 claim in the present case was improperly dismissed.

V. NINTH CIRCUIT'S RULING ON SUMMARY JUDGMENT IS IN CONFLICT WITH THIS COURT'S DECISION IN *SHEUER* and *HAINES*.

Another clear indication that district court knew there were genuine issues of material fact were in dispute can be found in the district court's judgment on page 8, line 17 (App.): "Plaintiffs allege a series of facts that, **if believed** " indicates that the district and appellate courts did not view the evidence in a light most favorable to the non-moving party. This is contrary to the Supreme Court's ruling in *Matsushita Elec. Co. v Zenith Radio Corp.* 475 U.S 574 (1986); *Scheuer v Rhodes* 416 U.S. 232 (1974);

The Ninth Circuit did not follow its own ruling in *Noll v Carlson* 809 F.2d 1446, 1148 (9th Cir. 1987). The district court must provide the *pro se* litigant with notice of the complaint's deficiencies and opportunity to amend prior to dismissal. See *Haines v Kerner* 404 U.S. 519 (1972)

The Ninth Circuit's decision is in conflict with its own ruling in *Neely v St. Paul Fire & Marine Ins. Co.* 584 F.2d 341 (9th Cir. 1978) In the instant case, it made a determination of the credibility of witnesses, whose summary judgment affidavits were in conflict with other evidence. In considering a motion for summary judgment, the court

is not permitted to weigh the evidence or judge the credibility of witnesses. See Neely, *supra*.

VI. QUALIFIED IMMUNITY FOR DEFENDANTS WAS DECIDED BY THE DISTRICT COURT AND UPHELD BY THE NINTH CIRCUIT IN A WAY THAT CONFLICTS WITH THIS COURT'S RULING IN *ANDERSON* AND *MALLEY*.

The Ninth Circuit ruled that the Defendants were entitled to qualified immunity, because the Petitioners did not identify a constitutional right which was violated. They also ruled that the right to observe the vote count is not constitutionally protected. This ruling in conflict with this Court's decision in *U.S. v Mosley* 238 U.S.383 (1915). which held that the right to vote includes the right to have it honestly counted.

The Ninth Circuit also ruled that right to observe the vote count was not clearly established at the time of the violation. It also ruled that no reasonable person would suspect that the election workers' conduct violated the plaintiffs rights. This is in conflict with *Anderson v Creighton* 483 U.S. 635. because the unlawfulness of denying the the observe the vote tally should have been apparent under pre-existing law from other circuits. In the absence of a binding precedent, courts should look to all available cases including those from other circuits. *Ward v County of San Diego* 791 F.2d 1329,1332 (9th Cir. 1986)

It is clearly established law that the right to vote in accordance with state law is one secured by the Federal

Constitution. *United States v Classic* 313 U.S. 299 (1941); *Wilkins v United States* 376 F.2d 552 (5th Cir. 1967) The term "vote" includes all action necessary to make a vote effective....and having such vote properly counted. *Allen v State Board of Elections* 393 U.S. 544 (1969). Therefore, A.R.S. ¶16-601 would qualify as an act necessary to casting an effective vote and having it properly counted.

Elections inspector Alan Harding's summary judgment affidavit states that did not count the ballots before sealing the bag (CR87 Ex.A). The right of a qualified voter to vote and have his vote counted is secured by Article 1 ¶2 &¶4 of the Constitution. *United States v Classic* 313 U.S. 299 (1941) It qualifies under the equal protection clause of the Fourteenth Amendment for protection from impairment by a refusal to count votes in an arbitrarily selected precinct. *United States v Olinger* 759 F.2d 1293 (7th Cir.1985)

The district court and Ninth Circuit both ruled that the defendants had qualified immunity. However, neither court took judicial notice of A.R.S.38-446 (A person who does not act in good faith reliance on the attorney general's opinion is personally liable). While it is true that attorney general opinions are not law, A.R.S.38-446 is is law. Federal Courts are bound to take judicial notice of state statutes. *Lamar v Micou* 114 U.S. 218 (1885)

The evidence (tape and transcript) showed that the troubleshooter said "I don't care about the attorney general opinion." According to Arizona state

law, he ***is personally liable.*** This would include all other defendants who were present at the poll when Dan Gutenkauf read the Attorney General opinion.

The election workers knew they had a duty to count the ballots cast when the polls close, because the 1996 pre-election flyer stated the duty ***four times.*** Yet, the election workers violated the plain terms of A.R.S.16-601. The Arizona Supreme Court has ruled that if public officials violate the plain terms of a statute, and knowingly violate the law, they are liable. See *Button v Nevin* 44 Ariz. 247, 257, 36 P.2d 568 (1934). Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Malley v Briggs* 475 U.S. 335 (1986)

Any reasonable person would know that public records are open to inspection, See *Carlson v Pima* 141 Ariz. 487, 490, 687 P.2d 1242,1245 (1984); and that voters have the right to have their vote counted See *U.S. v Classic* 313 U.S. 299 (1941). The object of election laws is to prevent fraud and guarantee to the voter the registration and count of his ballot. *Averyt v Williams* 8 Ariz. 355 (1904)

It is clearly established law that election statutes are mandatory, *Miller v Picacho Elementary Dist. No. 33* 179 Ariz. 178 (1994) and therefore, publicly counting the votes cast is not discretionary. See *U.S. v Baldridge* 11 F. 552, 558 (Circuit Court N.D. Alabama 1882)

Government officials performing ***discretionary*** functions are immune from liability if their conduct does not violate clearly established statutatory

or constitutional rights. See *Harlow v Fitzgerald* 457 U.S. 800, 818 (1982) Since the vote count under A.R.S 16-601 is mandatory, qualified immunity does not apply.

VII. NINTH CIRCUIT'S MISAPPLICATION OF CASE LAW, DEPARTURE FROM ESTABLISHED PROCEDURES, AND CONFLICTING RULINGS CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

The Ninth Circuit has extended the doctrine of qualified immunity when making discretionary decisions, and extrapolated it to cover mandatory ministerial duties of election workers.

The Ninth Circuit has extended the holding in *Gamza v Aguirre* 619 F.2d 449, 453-54,(1980) dealing with minor procedural errors in local elections, and extrapolated it to intentional misconduct in federal elections.

The district court and Ninth Circuit granted the State defendants and City of Tempe defendants' motion to dismiss without taking judicial notice of the evidence presented in response to summary judgment, No mention was made in the judgment of Maricopa County's 1996 pre-election flyer and the 1998 election training manual. These exhibits clearly showed that election workers had a duty to count votes when the polls close, and the public has a right to be present and take pictures. Maricopa County's 1998 Election Training manual states on page 31:

"AFTER THE LAST PERSON HAS VOTED, ANYONE CAN OBSERVE THE CLOSING OF THE POLLS. PICTURES CAN BE TAKEN AS LONG AS THERE AREN'T ANY CLOSE-UPS."

This evidence was not mentioned in the district court's judgment.

By granting the motions to dismiss without taking judicial notice of these facts, the lower courts ruled in conflict with *Mack v South Bay Beer Distributors, Inc.* 798 F.2d 1279, 1282 (9th Cir. 1986). Therefore, the motions to dismiss were improperly granted.

The instant case parallels *Fordyce* in that Maricopa County Attorney Mike Sullivan stated: **"and when Mr.Liddle came up there, whether that constitutes assault or not, we'll litigate that."** (See App.) This is a **admission** of an issue of material fact in dispute.

The district court's own language admits that this was an issue of material fact in the order.(Pg.A-9): "Unconvinced, Liddle asked Plaintiffs to leave, and **allegedly threatened** to have the Plaintiffs removed by the sheriff if they refused. Based on the ***Ninth Circuit's own ruling*** in *Fordyce*, the instant case should have been remanded.

VIII. THE NINTH CIRCUIT'S RULING IS IN CONFLICT WITH THIS COURT'S DECISION IN *MONELL* .

The district court stated in footnote 9 (A-22) that the affidavits of other who were denied access to public records (vote tally) reflect the policies of the Defendants. Yet, the court ruled that Maricopa County was not liable. This is in direct conflict with this Court's ruling in *Monell v Dept. of Soc. Servs*.436 U.S.658, 694 (1978). That case ruled that a municipal defendant may be held liable under ¶1983 if the unlawful actions of its employees or

BEST AVAILABLE COPY

agents were pursuant to a custom or policy. The Ninth Circuit has departed from it's previous decision in *Ting v U.S.* 927 F.2d 1054 (9th Cir. 1991) that that a governmental officer may be liable for failure to adequately supervise or train its employees. Again, this calls for this Court to exercise its supervisory powers.

IX. THE ISSUES PRESENTED ARE IMPORTANT TO THE PUBLIC AT LARGE, NOT JUST THE PETITIONERS.

Voting is the highest right that a citizen has. *Wesberry v Sanders* 376 U.S. 1,17, (1964) This case is important to the public, not just the Petitioners. Several other voters submitted affidavits that they were also threatened and intimidated by election workers. If the Ninth Circuit's decision stands affirmed, it means that **ANY WHITE VOTER CAN BE LEGALLY INTIMIDATED** as long as the intimidator expresses no racial animus.

There are several civil rights and voter watchdog groups who are interested in the issues this case presents. If this Court does not hear this case, the public will perceive that the Supreme Court is indifferent to First Amendment rights and the issue of voter intimidation. In short, the public will lose respect for the judicial system and any confidence in the soundness of its decisions. It will show that the Court has little regard for what is the highest right that citizens have.

If the Court declines review, the ballot box will no longer be considered

an effective option for redress of grievances. The courts have a duty of ensuring that the statutory provisions protecting the electoral process are not violated. *Green v Osborne* 157 Ariz. 363 (1988) This court also has a duty to exercise its supervisory powers under Rule 10.1 when the lower courts' rulings are in conflict.

CONCLUSION

Accordingly, and for the foregoing reasons, this Court should issue its Writ of Certiorari to the Ninth Circuit Court of Appeals, reverse the judgment and remand this action for further proceedings not inconsistent with the opinion of this Court.

RESPECTFULLY SUBMITTED this 25th day of February, 2000

Dennis M. Gutenkauf

Daniel A. Gutenkauf

Dennis M. Gutenkauf
Daniel A. Gutenkauf
c/o 1847 E. Apache Blvd. #41
Tempe, Arizona PZ 85281
Telephone: (480)966-7018
Petitioners, In Pro Per

PAGE LEFT BLANK

NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1999

DENNIS M. GUTENKAUF,
DANIEL A. GUTENKAUF
PETITIONERS

v.

MARICOPA COUNTY et,al
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

PAGE LEFT BLANK

APPENDIX

SUBJECT	PAGE
Judgment of Ninth Circuit Court of Appeals	A - 1
Judgment of District Court	A - 5
Order of District Court	A - 6
Amended Complaint	A - 32
Statutes Involved	A - 55

PAGE LEFT BLANK

FILED
NOV 30 1999

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS M. GUTENKAUF; DANIEL A. GUTENKAUF Plaintiffs-Appellants v MARICOPA COUNTY, in its entirety a municipality duly incorporated under the laws of the State of Arizona; MARICOPA COUNTY SUPERVISORS, Board of: ED KING, in his individual TOM RAWLES, in his individual and official capacity: DON STAPLEY, in his individual and official capacity; BETSEY BAYLESS, in her individual and official capacity; MARY ROSE WILCOX, in her individual and official capacity; MARICOPA COUNTY ELECTIONS DEPARTMENT; KAREN OSBORNE, in her individual and official capacity as Director of Elections; LINDA WEEDON, in her individual and official capacities as Assistant Director of County Elections and head of elections Hotline;	No.99-15425 D.C. No.CV97-02308-RCB MEMORANDUM

ROSE YERA, in her indivi-)
dual and official capa-)
city, Hotline Worker;)
DORA RHODES, in her indi-)
vidual and official capa-)
city, Hotline Worker:) MEMORANDUM
CAROL SCHLEIF,in her in-)
dividual and official)
capacity, Hotline Worker;)
PATSY WOLFE, in her indi-)
vidual and official capa-)
city,Hotline Worker;)
WILLARD GENTRY,in his in-)
dividual and official ca-)
pacity as Election Mar-)
shal; ALLEN HARDING, in)
his individual and offi-)
cial capacity as Election)
Inspector; VIRGINIA)
HARDING,in her individual)
and official capacity as)
Elections Judge; JAMES)
PATRICK DELANEY,JR., in)
his individual and offi-)
cial capacity as Election)
Clerk; ALICIA VALENZUELA)
in her individual and)
official capacity as)
Election s Clerk; SCOTT)
LIDDLE, in his individual)
and official capacity as)
Troubleshooter; HELEN)
PURCELL, in her indivi-)
dual and official capa-)
city as County Recorder;)
JANE DEE HULL,in her)
individual capacity;)
ELECTION TRAINING ADVI-)
SORY COMMITTEE;)
MARGARET J. STEARS,in her)
individual capacity;)
LINDA WEEDON; SHARON R.)

KEENE WRIGHT, in her individual capacity; ERYN MCCARTHY, in her individual capacity; PATRICIA L. WALL, in her individual capacity; LEROY BETTS, in his individual and official capacity as police officer; WILSON, Officer, Tempe Police; TERRENCE HULL; LISA K. DANIEL, in her individual capacity; LINDA RAWLES; JERRI L. STAPLEY; EARL V. WILCOX; CHARLES E RHODES; GEORGE E. SCHLEIF, JR., DOROTHY GENTRY; HEATHER LIDDLE; RANDALL WILSON, in his individual and official capacity as police officer; JOE R. PURCELL; SHARON L. BETTS; JAMES S. STEARS; HAROLD J. WRIGHT; LINDA WILSON,

Defendants-Appellees.

MEMORANDUM

Appeal from
the United States District Court
for the District of Arizona
Robert C. Broomfield
District Judge, Presiding

Submitted September 22, 1999 [2]
Before: CHOY, SNEED, FERGUSON,
Circuit Judges

1 This disposition is not appropriate for publication and may not be cited by the courts of this circuit except as may be provided by 9th cir.R.36-3

2 The panel unanimously finds this case suitable for decision without oral argument
See Fed.R. App. P. 34(a)(2)

Brothers Daniel and Dennis Gutenkauf ("the Gutenkaufs") appeal the dismissal of their action for failure to state a viable claim. The Gutenkaufs allege that the defendants violated 42 U.S.C. ¶¶1983, 1985(3), and 1986 , and Arizona state law, by denying them their right under state law to witness the vote count in the 1996 presidential election at their local precinct. We have jurisdiction under 28 U.S.C. ¶1291, and we affirm.

The facts as stated by the Gutenkaufs are insufficient to support their federal claims for the reasons stated by the district court in its thorough and well-reasoned order. The district court correctly held that the Gutenkaufs could not establish any federal claim against any named defendant, and that any motion to amend would be futile.

AFFIRMED.

FILED
JAN 8, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DENNIS M. GUTENKAUF, et al Plaintiffs,	**JUDGMENT IN A CIVIL CASE**
v	CIV 97-2308 PHX-RCB
MARICOPA COUNTY, et al, Defendants	

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came for consideration by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, per the Court's order entered January 8, 1999, Plaintiffs to take nothing and action is dismissed with prejudice.

January 8, 1999

Richard H. WEARE
District Court
Executive/Clerk

/s/ Diane Taylor
(By) Deputy Clerk

FILED
JAN 8 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DENNIS M. GUTENKAUF & DANIEL A. GUTENKAUF, Plaintiffs	)	No, CIV 97-2308 PHX-RCB
vs.	)	ORDER
MARICOPA COUNTY, et al. Defendants	)	

Plaintiffs filed their Amended Complaint on February 26, 1998, alleging assault, intentional infliction of emotional distress, and violations of 42 U.S.C. ¶¶1983, 1985(3), and 1986. Certain defendants have filed a Motion to Dismiss for failure to state a claim and insufficient service of process. This matter is fully briefed, and the court is prepared to rule.

BACKGROUND

This litigation apparently stems from events that occured on the evening of the last presidential election, November 5, 1996. Plaintiffs' concern about voter fraud throughout the campaign, particularly directed toward their candidate of choice, Pat Buchanan, served as a catalyst for the events that transpired on this evening. The facts, as alleged in the amended as follows.

Daniel and Dennis Gutenkauf cast their votes during the presidential

election at Tempe, Arizona Precinct 19, located at a Tempe Apartment Complex. Dennis voted at approximately 5:00 p.m., and Daniel voted just prior to the close of the polling place, at 7:00 p.m. Upon picking up his blank ballot, Daniel Gutenkauf informed the polling place employees, Defendants Willard Gentry (Election Marshal) and Allan Harding (Election Inspector), that he "intended to monitor the vote count" subsequent to the close of the polls. He also provided the election officials woth a copy of an Arizona statute, A.R.S.¶16-601, which Plaintiffs contend entitles them to view the tallying of election ballots.[1] True to his word, Daniel remained at the polling place subsequent to the time he turned in his completed ballot, and after the workers announced that the polls were closed.

At this time, Elections Clerk James Patrick Delaney Jr. asked Daniel Gutenkauf for and received permission to conduct a search of Daniel's person. In his complaint, Daniel claims that he consented to the search only because "he feared he would be denied the right to stay if he refused the search."

---

1 The text of the A.R.S.¶ 16-601 reads as follows:

As soon as the polls are closed and the last has been deposited in the ballot box, the election board or the tally board shall immediately count the votes cast. The count shall be public, in the presence of bystanders, and shall be continued without adjournment until completed and the result determined and declared.

Apparently, at this point, Daniel began to record the events on a tape-recording device that he brought to the polling place. Subsequent to this time, Dennis Gutenkauf joined his brother at Precinct 19.

Dennis arrived carrying a video camera. He was not searched. Both brothers apparently asserted their right to watch the vote count, and Dan Gutenkauf expressed a desire to videotape the event. However, the workers at the polling place were less than eager to embrace the Gutenkaufs' request.

Harding refused to allow the brothers to videotape the vote count, and called an election troubleshooter for advice on how to proceed. While waiting for a response, Harding became increasingly concerned and called the police. Tempe Police Officers Leroy Betts and Randall Wilson, also named as defendants, arrived shortly thereafter. Their arrival was followed by the arrival of Election Troublshooter Scott Liddle.

Mr. Liddle requested a "letter of authorization" from the Gutenkaufs. The brothers replied that such a letter was unnecessary and Dan Gutenkauf attempted to quote Arizona Attorney General (AG) Opinion #64-40-L. When Mr. Liddle indicated that he was only interested in the law, rather than the AG's Opinion, the Gutenkaufs read the text of A.R.S. 16-601 to Mr. Liddle.2

---

2 Attorney General Opinions are not law. Such opinions are advisory and are not binding on a court of law. See Arizona v Deddens 542 P.2d 1124 (Ariz. 1975) Thus, it is

Unconvinced, Liddle asked Plaintiffs to leave, and allegedly threatened to have the Plaintiffs removed by the sheriff if they refused.

Plaintiffs finally left the polling place, allegedly because they feared "false arrest, and possible excessive force.[3] Officers Betts and Wilson then stopped Plaintiffs in the parking lot, and completed a police report on the incident. Following this occurence, Plaintiffs drove to the counting center and "related the incident to (Defendant Karen Osborne."

Plaintiffs sue numerous officials, both remotely and intricately connected with the voting procedures and policies, and the events of November 5, 1996.[4]

---

understandable while Mr. Liddle would be reluctant to place unquestionable reliance on the AG's Opinion.

3. Plaintiffs attribute this fear of excessive force, in part, to the "Scott Norberg incident." Scott Norberg was a thirty-three year old man who died while in the custody of Maricopa County Detention Officers, following a confrontation with detention officers. Plaintiffs do not allege any facts to show that the officers involved in this incident used, or threatened to use, force against them. Rather, Plaintiffs merely allege that they feared excessive force.

4. Defendants named in this lawsuit include Maricopa County. Jane Dee Hull,Terrence Hull, Lisa K. Daniel, Maricopa County Supervisors, Ed King, Tom Rawles, Don Stapley,Jerri L.Stapley, Betsey Bayless, Mary Rose Wilcox, Earle V. Wilcox, Maricopa County Elections, Karen Osborne, Linda Weedon, Helen Purcell, Joe R. Purcell, Maricopa County Elections Hotline, Rose Yera, Dora Rhodes,

Defendants McCarthy, Wall, Daniel, Hull, et ux. and Stears et ux. have moved to dismiss the Amended Complaint for failure state a claim upon which relief can be granted ("First Moving Defendants"). Defendants Stears et ux. also have moved to dismiss for insufficient service of process. Defendants City of Tempe, Leroy Betts, Randall Wilson, and Sharon Betts have moved to dismiss as well ("Second Moving Defendants").5 The remaining Defendants have moved for summary judgment.

Carol Schlief, George J. Schlief,Jr., Patsy Wolfe,Willard Gentry, Dorothy Gentry, Allen Harding, Virginia Harding, Albert Padberg, James Patrick Delaney, Jr., Alicia Valenzuela, Scott Liddle, Heather Liddle, Leroy Betts, Sharon L. Betts, Randall Wilson, Linda Wilson, Election Training Advisory Committee, Margaret J. Stears, James S. Stears, Sharon R. Keene-Wright, Eryn McSarthy, Patricia L. Wall, and all unknown others in their individual and official capacity."

5. In addition, Plaintiffs have filed a motion to strike alleging that the government attorneys are not properly before this court. Plaintiffs contend that the attorneys have failed to provide notarized signatures. This motion is wholly without merit. The law cited, A.R.S. ¶38-231, does not require such notarization. The government attorneys are properly before this court, and this motion will be denied in its entirety.

In connection with this motion to strike the First Moving Defendants seek sanctions against Plaintiffs arguing that they filed the motion with "questionable motivation."

The court agrees that Plaintiffs motion bordered on frivolous. However, it is unclear that Plaintiffs lacked a good faith belief in

DISCUSSION

I. Plaintiffs have failed to State a Claim Under Sections 1983, 1985(3),and 1986.

Defendants move to dismiss under Fed.R.Civ.P. 12(b)(6). Under this rule, "dismissal for failure to state a claim is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support which would entitle him to relief.'" Schowngert v General Dynamics Corp. 823 F.2d 1328, 1332 (9th Cir. 1987) (quoting Conley v. Gibson, 355 U.S. 41,45-46 (1957), cert. denied, 503 U.S. 951 (1992). Thus, in undertaking its analysis, the court must limit its review to the contents of the complaint, accepting the material allegations as true and construing them in the light most favorable to the (nonmovant)." Id. Moreover, pro se complaints must be liberally construed, especially in civil rights cases. Ferdik v Bonzelet, 963 F.2d 1258, 1261 (9th Cir.1992). The court concludes, however, that even under this standard, Plaintiffs' allegations fail to state a claim under ¶¶1983, 1985(3), and 1986, and the court will not exercise jurisdiction over the remaining state law claims.

---

their arguments, and Plaintiffs relented from their position in their reply. Thus, the court will not sanction Plaintiffs at this point. On the other hand, it will caution Plaintiffs that if they are using their filings before this court as a method of harassment toward Defendants, it will not hesitate to sanction them.

A. Sections 1985(3) and 1986 are Not Appropriate Avenues for Relief Based on Plaintiffs' Allegations.

The First Moving Defendants note that they are not named in Plaintiffs' Third and Fourth Causes of Action, those under Sections 1985(3) and 1983. All Defendants further argue that these counts must also be dismissed because "Plaintiffs are two white, male voters and not members of any protected class." To the extent that Plaintiffs object to this argument, they apparently do so on the basis of their belief that as voters, they are members of a protected class.

1. Section 1985(3)

Section 1985(3) provides a right of action where two or more people conspire to violate the civil rights of another. The text of ¶1985(3) reads, in pertinent part:

> If two or more persons..conspire... for depriving either directly of indirectly, any person or class of persons of the equal protection of the laws...or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States ; to injure any citizen in person or property on account of such support or advocacy; in any case of

> conspiracy set forth in this section ....the party so injured or deprived may have an action for the recovery of damages..... 42 U.S.C.¶1985(3)

The Supreme Court in United Brotherhood of Carpenters and Joiners v. Scott has determined that the statute has limited application, because the statute's purpose was to address animus towards African-Americans: "in the first place, it is a close question whether 1985(3) was intended to reach any class-based animus other than animus aginst Negroes and those who championed their cause..." 463 U.S. 825,836 (1983). While the court did not entirely prevent the application of the statute toward other class-based animus, it did specifically hold that ¶1985(3) cannot "reach conspiracies motivated by commercial animus." Id. at 839. In so determining, the court quoted favorably from a previous opinion, "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 835 (quoting Griffin v Breckenridge, 403 U.S.88, 102 (1971)); see also Briley v California , 564 F.2d 849, 858 (9th Cir. 1977)(complaint fails to state claim under 1985(3) where allegations linking conduct to "racial or any other invidiously discriminatory animus" are absent); Andrews v Fowler 98 F.3d 1069, 1079-80 (8th Cir. 1996)("(T)he plaintiff must demonstrate discriminatory purpose in that

the defendants selected the particular course of action 'because of (,) not merely in spite of (,) its adverse effects upon an identifiable group.'") (quoting Bray v Alexandria Women's HealthClinic, 506 U.S. 263, 272 (1993)) (further internal quotations omitted); Grimes v Smith, 776 F.2d 1359, 1363-67 (7th Cir.1985) ("(Section) 1985(3) does not reach nonracial political conspiracies" or garden variety...vote fraud."); McLellan v Mississippi Power and Light Co. 545 F.2d 919, 931-32 (5th Cir. 1977)("(I)n this case as we are presented with conduct far from the core of the coverage intended by Congress. Indeed, we find it hard, if not impossible, to conceive of such conduct being within the intended scope of section 1985(3)."); Estes-El v Town of Indian Lake 954 F. Supp. 527, 531-32 (N.D.N.Y. 1997) (dismissing ¶1985(3) claim because complaint was "completely devoid of any allegations that (plaintiff was) a member of a protected class or that defendants action with a race or class-based discriminatory animus.") Maida v Andros, 710 F. Supp. 524 (D.N.J.1988)("(S)ection 1985 was not intended to apply to all tortous interference with the rights of others, but only those which are founded upon some class-based or racial invidiously discriminatory intent.").

In the present case Plaintiffs allege as series of facts that, if believed, would establish that election workers prevented them from observing the vote count, and that these workers, and two Tempe police officers, attempted to, and did, intimidate and coerce Plaintiffs into leaving the voting

precinct. These facts are insufficient to state a claim under ¶1985(3), as articulated above.

Plaintiffs have failed to allege any class-based animus. Even accepting Plaintiffs' argument that they are a protected class of "voters", their complaint fails to establish that any Defendant acted in any manner because Plaintiffs were registered voters.[6] Furthermore, the complaint is completely devoid of any separate allegation of class- or race based animus. Rather, at best, Plaintiffs assert that Defendants acted in an inappropriate manner because Plaintiffs attempted to assert various rights that they believed they had pursuant to state law. The Amended Complaint fails to allege that Defendants behaved in any manner because of some particular trait that Defendants possessed.[7] In short, Plaintiffs

---

6. Moreover, the class of voters is not a class the can be characterized as class or racially based.

7. A liberal reading of the complaint fails to aid the Plaintiffs in this area. The court need not invent allegations where none exist. See Gorman v Roberts, 909 F. Supp. 1493, 1499-1500(M.D. Ala. 1995). No matter how liberally the couet interprets the pro-se Plaintiffs' Amended Complaint, it simply does not contain the facts from which the court could infer class or race based animus. On the contrary, Plaintiffs complaint supports the dismissal of this count, as Plaintiffs argue that they attempted to assert a right held by the public at large, rather than a protected class.

allegations fall short of establishing the invidious Discriminatory intent that would be required to state a claim under 1985(3).[8] As such dismissal of this claoim is appropriate.

2. Section 1986

Because Plsintiffs fail to sufficiently plead their cause of action under ¶1985, their derivative ¶1986 claim is also suspect. Section 1986 provides a cause of action for failing to prevent certain civil rights violations. Defendants argue that ¶1986's applicability is contingent upon the presence of a ¶1985 violation.

Section 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which person by reasonable diligence could have prevented.....

---

8. In addition, it is unlikely that Plaintiffs could meet the additional requirements to establish a conspiracy under ¶1985. However, in light of the court's holding, it need not address the remaining factors.

42 U.S.C.1986. The text of the statute clearly requires a violation of ¶1985 to support a violation of ¶1986. Case law further supports this interpretation. See McCalden v California Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1990) (without a valid ¶1985 claim there can be no claim under ¶1986); Trerice v Pedersen, 769 F.2d 1398, 1403 (9th Cir. 1985)(same); Grimes, 776 F.2d at 1363 n.4 (same).

Thus, because the court has already determined that Plaintiffs have failed to state a claim under ¶1985, it must also dismiss Plaintiffs derivitive claim under ¶1986.

B.Plaintiffs have Failed to Allege Sufficient Facts to Show That a Violation of ¶1983.

The meat of the Plaintiffs' Amended Complaint, without a doubt is contained in their ¶1983 claim. Essentially, Plaintiffs claim that Defendants, as state actors, intentionally interfered in Plaintiffs' exercise of their First and Fourteenth Amendment Rights. Defendants argue that Plaintiffs ¶1983 claim must fail asto the First Moving Defendants because Plaintiffs premise their claim on respondeat superior liability. The Second Moving Defendants argue that the issue involves possible constitutional ramifications stemming from a matter of unsettled state law, and that this court should abstain pursuant to Railroad Commission v Pullman Co. 312 U.S. 496 (1941). Moreover, all Defendants assert that Plaintiffs merely allege a violation of state law, and that an independent violation of state law, without more, cannot support a cause of action under

¶1983. The court agrees with the latter contention.

1. Plaintiffs claims are Insufficient as a matter of Law

Plaintiffs argue that the Defendants violated various of their Constitutionally protected rights and certain state laws. They assert claims under ¶1983.

Section 1983 provides an avenue to redress rights protected by the Constitution and other federal laws. A violation o state law without more, will not support a cause of action. See Schlette v Burdick, 633 F.2d 920, 923 n.3 (9th Cir. 1980). Rather, in order to state a claim under ¶1983, a plaintiff must allege facts establishing that the violation of state law resulted in the deprivation of Constitutionally protected rights. See Lovell v Poway Unified School Dist., 90 F.3d 367, 370 (9th Cir.1996). Plaintiffs allegations do not rise to this level.

Plaintiffs do not articulate their allegations especially well; however, the examples they provide of "protected" rights which, apparently they feel Defendants violated, are as follows:

> Jane Dee Hull, acting under color of state law, and under color of office of Secretary of State, breached her duty under A.R.S.16-407(B), by issuing election officer certificates to persons who were not competent in election law.
>
> Jane Dee Hull breached her duty under A.R.S. 16-407(G) to outline problems of the previous 2 years to the senate and house of representatives.....
>
> Acting under color of state

law, Lisa Daniel breached her duty to recommend adequate training....

In short, this breach of duty by Jane Dee Hull and Lisa Daniel, set into motion a series of events, that they should have reasonably forseen (sic) would result in the deprivation of Constitutionally protected rights. Acting under color of state law, their breach of duty, caused the Plaintiffs to be subjected to the deprivation of their First, Fourth,and Fourteenth Amendment rights.

Complaint ¶¶58-62

The Election Training Advisory Committee members.....each had a duty under A.R.S.16-407(F) to evaluate the form and content of all examinations in the curriculum proposed by Jane Dee Hull. The training advisory committee members () breached their duty to emphasize the legal aspects of elections in the last 2 years, resulting in election workers at Precinct 19 () who did not know election law. The breach of duty by committee workers, acting under color of law caused the Plaintiffs to be subject to the deprivation of their constitutionally protected rights under the First, Fourth, and Fourteenth Amendment rights.

Complaint ¶63.

Maricopa (C)ounty Supervisors.. had a duty under A.R.S.16-532 to conduct a class of instruction for

election board members on election laws. The November 5, 1996 Training Manual contained no instruction on the public's right to observe the vote count under A.R.S. 16-601. The breach of duty by Maricopa County Board of Supervisors ...caused the Plaintiffs to be subjected to the deprivation of their constitutionally protected rights under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution.

Amended Complaint ¶64

(T)he Elections Department made a conscious decision to not schedule training for election clerks and marshals, which resulted in an incompetent election marshal at Precinct 19, and caused the Plaintiffs to be subjected to the deprivation of their rights under the First, Fourth, and Fourteenth Amendments ....

Amended Complaint ¶67

(The) policy of denying access of public records to those citizens who might uncover voter fraud, and a policy to not prosecute violators of election law, caused the Plaintiffs to be subjected to the deprivation of the First, Fourth, and Fourteenth Amendment rights, protected by the U.S. Constitution.

Amended Complaint ¶ 73.

> Scott Liddle and the election hotline knew or should have known that it is a violation of A.R.S. 16-1013(A) to threaten or intimidate a voter, and that doing so would result in the deprivation of Constitutionally protected rights.

Amended Complaint ¶ 74

> Acting under color of state law, Scott Liddle and the elections hotline caused the Plaintiffs to be deprived of their right to:
>
> a) be secure in their persons and be free from bodily harm. as protected by the Fourth, and Fourteenth Amendments to the U.S. Constitution,
>
> b) redress grievances and access public records, as protected by the First and Fourteenth Amendments to the U.S.Constitution,
>
> c) observe the vote count without dilution as guaranteed by the due process clause and equal protection clause of the Fourteenth amendment to the U.S. Constitution.

Amended Complaint ¶77.

An overview of the allegations reveals that any supposed deprivation of Constitutionally protected rights allegedly stemmed from one of the following: poor training of election officials, a failure to report voting-related problems Congress, lack of

access to the vote count,[9] the threat of arrest, or the subsequent failure to prosecute individuals involved in the November 5, 1996 incident. Plaintiffs point to various state laws, in addition to their own beliefs, to assert that these rights exist and that the violation of the rights somehow infringes upon their rights under the Constitution. They look to the First, Fourth, and Fourteenth Amendments (equal protection clause and due process clause) as the sources of these Constitutional rights.

Plaintiffs allegations of improper training, failure to allow them to observe the vote count, and failure to report difficulties in the voting process are all based in state law. Plaintiffs cite the sections of Arizona which they believe create these rights: A.R.S.¶16-601; A.R.S.¶16-532; and A.R.S.¶16-407. Although it is not clear that the Defendants violated any of these sections, and the court is not suggesting that any violations occured, even if these sections were violated, no Constitutionally protected rights were invoked to support Plaintiffs ¶1983 claim.

---

9 Plaintiffs also include some facts regarding other individuals inability to access public records. However, Plaintiffs do not have standing to redress these individuals' causes of action, thus the allegations are only important to the extent that they reflect the policies of Defendants.

It is clear that the First Amendment protects the right to vote and to have one's vote counted. See Reynolds v Sims,377 U.S. 533 (1964). However, this constitutional right is a narrow right and not all minor errors in voting procedure amount to a constitutional violation. See Gamza v Aguirre 619 F.2d 449, 453-54 (5th Cir. 1980). In fact, courts have widely observed that federal court is not the proper forum to deal with "garden variety election challenges. See id.; see also Thrasher v Board of Supervisors, 765 F.Supp. 896, 900 (N.D.Miss. 1991)(If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures.... would be superceded by a section 1983 gloss.")

In the present instance, no one attempted to prevent Plaintiffs from voting, and no one prevented such vote from being counted. The simple fact that Plaintiffs could not observe the actual tallying of the vote, does not suggest nor support the belief that election officials, particularly any of the named Defendants, prevented their votes from being properly counted. 10 The First

---

10. As for the Plaintiffs' attempt to argue that votes were not properly counted based on an article by another individual, it must fail. Plaintiffs have offered no factual support for this allegation, and the article in question does not address the election that took place on November 5, 1996, nor Plaintiffs' individual situation. Plaintiffs may not assert claims based on the rights of other individuals. Quite

Amendment, therefore, does not extend to Plaintiffs complaints about improper election procedure or training.

Similarly, neither the equal protection clause or the due process clause of the Fourteenth Amendment is of help to the Plaintiffs. The equal protection clause prevents individuals from being treated differently on the basis of a particular trait. The due process clause guarantees due process before certain fundamental rights may be infringed upon. As discussed previously, Plaintiffs do not allege that they are a protected class. Moreover, Plaintiffs do not even allege that they were treated different on account of any particular trait. While Plaintiffs do not allege that they were exercising a fundamental right--the right to vote--they do not even allege facts to show that any Defendant's action infringed upon this fundamental right. Plaintiffs claims of state law violations simply do not invoke any constitutionally protected right, and these claims cannot

---

simply, Plaintiffs never allege that Defendants did not allow them to vote, or that Defendants did not count their vote. However, the evidence supplied by both parties in conjunction with the motion for summary judgment reveals that the Plaintiffs could not allege such a thing. They were allowed to vote, and there is no evidence that the voting process was compromised.

support Plaintiffs' cause of action under ¶1983. [11] Nor does the failure to prosecute any individuals for the alleged violations support such a claim. [12]

Accordingly, if Plaintiffs state a claim under ¶1983 it must be because of their allegations surrounding the threat of arrest. Plaintiffs allege that they feared excessive force, and that the threat was directed at "voters". However, for similar reasons as already discussed,this claim must fail as well.

A potential assault, or an act of threatening a voter who is attempting to assert his or her constitutional right to vote, may result in a cognizable ¶1983 claim. However, the key in stating a claim is that the state actor intended to interfere with the exercise of a constitutionally protected right. Here, Plaintiffs were asserting the right to observe the vote count, not the right to vote or to have one's vote counted. Plaintiffs do not deny that they actually voted in the election, and they do not assert that their votes went uncounted. Thus, this claim is also insufficient. Thus, Plaintiffs ¶1983 claim must fail.

---

11. To the extent that Plaintiffs contend that the fairness of the election was somehow compromised, the evidence reviewed in connection with summary judgment does not support Plaintiffs claims. See infra. Thus, even if the Plaintiffs managed to allege some violation actually infringing on the right to vote in a fair election, their claims still fail.

12. The decision to prosecute or not is a decision cloaked with prosecutorial immunity. See Imbler v. Pachtman, 424 U.S. 409 (1976)

2. Other Arguments

Because the court finds the above argument persuasive, it need not consider the Defendants' abstention or respondeat superior arguments.

II. Motion for Summary Judgment

The remaining Defendants (those connected with Maricopa County) moved for summary judgment on Plaintiffs' claims. The motion for Summary Judgment is based in large part on similar grounds as those discussed above, as well as the absence of evidence to support Plaintiffs' claims, and immunity under ¶1983 for those government officials acting in their official capacity.

To grant summary judgment, the court must determine that in the record before it there exists "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. Matsushita Elec. Co. v Zenith Radio Corp., 475 U.S. 574, 577 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact. Anderson v Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986). A material fact is any factual dispute that might affect the

outcome of the case under the governing substantive law. Id. at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. Id. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial, See Id. at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. See e.g., California Architechural Build. Prods., Inc. v Franciscan Cermics, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988).

A consideration of the evidence enforces the court's decision to dismiss this action. Plaintiffs' evidence simply does not establish a material question of fact, nor a genuine issue for trial on any of the federal claims. The evidence simply would not lead this court to any other conclusion than the one it has reached in connection with the motions for dismissal. As such, the court believes that the motion is well-taken.

The evidence in this matter shows that even if the court were to assume that Plaintiffs had gone far enough to allege that their right to vote in a fair election was compromised, which the court does not believe that they have done, there is little support for any such claim. Plaintiffs' evidence consists of conclusory allegations and lacks specific facts to support their

claims. As such, it is insufficient to create a question of fact. No evidence suggests that the voting process was compromised.

Moreover, Defendants are correct that they are entitled to qualified immunity as government officials acting in their official capacity. In order for Defendants to lose this immunity, Plaintiffs must identify a constitution right which was violated, and at the least, create a question of fact that the right was clearly established at the time of the violation, and that a reasonable person would know his conduct violate that right. See Anderson v. Creighton, 483 U.S. 635, 640 (1987). First, the right to observe the vote count is not a constitutionally protected right, and Plaintiffs, again, do not allege that their actual right to vote was compromised. Further, even if the right was constitutionally protected, it was not a clearly established right at the time of the alleged violation. Plaintiffs' contention that they read the Attorney General's Opinion to the poll workers is inapposite. Such an Opinion is not the law, see City of Prescott v. Town of Chino Valley, 803 P.2d 891 (1990), and therefore, the failure to adhere to such an Opinion is not evidence of a failure to conform to a clearly established right. Rather, the lack of case law regarded the right suggests the opposite. The statute has not been interpreted by an Arizona court in a published opinion, it is not a commonly understood right, and it simply is not clearly established. As such, no reasonable person would suspect that the

conduct of officials on the night in question violated any of Plaintiffs' rights.

In addition, any support provided by Plaintiffs' evidence (which is minimal in any event) regarding violation of state statutes and state tort-law claims is irrelevant. No evidence would change the fact that these allegations do not amount to a violation of ¶1983, ¶1985, or ¶1986. As such, the Plaintiffs cannot rebut summary judgment anymore than they could rebut a motion to dismiss. Accordingly, the court will grant summary judgment as well.

III. Conclusion

The court has determined that Plaintiffs have failed to state a claim under any of the federal statutes asserted as the basis of their federal claims. Plaintiffs have not plead any facts to show that they are member of a protected class, or that they suffered invidious discrimination. Their allegations fail to establish a violation of federally protected rights, and they have failed to plead facts to show any wrongdoing as to the moving Defendants. Thus, the court will grant this motion to dismiss.

Furthermore, the court concludes that there is ample reason to dismiss this complaint in its entirety. Plaintiffs' have failed to plead facts to support a ¶1985, ¶1986, or ¶1983 claim. This fact is true regardless of the Defendant. Plaintiffs simply have not plead invidious discrimination, or circumstances that infringe upon

federally protected rights. For this reason, Plaintiffs cannot state a federal claim against any named Defendant. The court declines to exercise supplemental jurisdiction as to the state law claims in the absence of any viable federal claim. Therefore, the court will grant both motions to dismiss as toward the First and Second Moving Defendants and grant the Motion for Summary Judgment filed by the Maricopa County Defendants. This action will terminate this litigation.

Moreover, the review of the evidence filed in conjunction with the Motion for Summary Judgment suggests that the Plaintiffs cannot establish any viable federal claim and that any motion to amend would be futile. Accordingly, the motions to dismiss will granted and the complaint will be dismiss as to all Defendants, with prejudice.

IT IS ORDERED granting Defendants' Motion t Dismiss (Doc.60).

IT IS FURTHER ORDERED denying, as moot Defendants' motion to strike (Doc.73).

IT IS FURTHER ORDERED granting Motion to Dismiss (Doc.78).

IT IS FURTHER ORDERED denying Plaintiffs' motion to strike (Doc.79).

IT IS FURTHER ORDERED denying Defendants' Motion for costs/sanctions (Doc.83).

IT IS FURTHER ORDERED denying, as moot Defendants' Motion to Stay (Doc.86).

IT IS FURTHER ORDERED granting Defendants' Motion for Summary Judgment (Doc. 87). The clerk is directed to enter judgment as dismiss this action, with prejudice.

IT IS FURTHER ORDERED denying Plaintiffs' Motion to Strike Affidavits (Doc. 92).

IT IS FURTHER ORDERED denying Plaintiffs' Motion for Sanctions (Doc. 100).

IT IS FURTHER ORDERED denying, as moot Defendants' Request for Order (Doc. 105).

DATED this 5 day of Janaury, 1999.

/s/ Robert C. Broomfield
United States District Judge

Copies to Plaintiffs pro-se and counsel of record

Dennis M. Gutenkauf &
Daniel A. Gutenkauf
c/o 1847 E. Apache Blvd. #41
Tempe, Arizona PZ 85281
Telephone:(602)966-7018
Plaintiffs Pro Per

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

	) NO.
Dennis M. Gutenkauf	) CIV 97-2308
Daniel A. Gutenkauf	) PHX-RCB
Plaintiffs	) JUDGE BROOMFIELD
	)
	) AMENDED COMPLAINT
v	) (Jury Trial)
	) (Requestted)
	)
	)

MARICOPA COUNTY, in its entirety, a municipality duly incorporated under the laws of the State of Arizona; JANE DEE HULL, in her individual capacity,TERRENCE HULL; LISA K. DANIEL, in her individual capacity, MARICOPA BOARD OF COUNTY SUPERVISORS: ED KING,in his individual and official capacity;TOM RAWLES,in his individual and official capacity,LINDA RAWLES; DON STAPLEY, in his individual and official capacity,JERRI L.STAPLEY; BETSEY BAYLESS, in her individual and official capacity; MARY ROSE WILCOX, in her individual and official capacity, EARL V. WILCOX; MARICOPA COUNTY ELECTIONS: KAREN OSBORNE, in her individual and official capacity as Director

of Elections; LINDA WEEDON, in her individual and official capacities as assistant director of County Elections,and Head of Elections Hotline;HELEN PURCELL,in her individual and official capacity as County Recorder;JOE R.PURCELL, MARICOPA COUNTY ELECTIONS HOTLINE: ROSE YERA, in her individual and official capacity; DORA RHODES, in her individual and official capacity; CHARLES E. RHODES; CAROL SCHLIEF,in her individual and official capacity; GEORGE H. SCHLIEF;PATSY WOLFE, in her individual and official capacity; WILLARD GENTRY, in his individual and official capacity as election marshal;DOROTHY GENTRY; ALLEN HARDING, in his individual and official capacity as Elections Inspector;VIRGINIA HARDING, in her individual and official capacity as Elections Judge;ALBERT PADBERG, in his individual and official capacity as Elections Judge; JAMES PATRICK DELANEY JR.,in his individual and official capacity as Elections Clerk;ALICIA VALENZUELA, in her individual and official capacity as Elections Clerk; SCOTT LIDDLE,in his individual and official capacity as Troubleshooter) HEATHER LIDDLE; LEROY BETTS, in his individual and official capacity as police officer, SHARON L.BETTS; RANDALL WILSON, in his individual and official capacity as police officer;LINDA WILSON; ELECTION TRAINING ADVISORY COMMITTEE: MARGARET J. STEARS,in her individual capacity, JAMES S. STEARS;

SHARON R. KEENE-WRIGHT, in her individual capacity, HAROLD J. WRIGHT;ERYN McCARTHY, in her individual capacity; PATRICIA L. WALL, in her individual capacity; and all unknown others in their individual and official capacity.

Defendants

COMES NOW the Plaintiffs, Dennis M. Gutenkauf and Daniel A. Gutenkauf, pro per, who allege and aver as follows:

I
JURISDICTION AND VENUE

1. Jurisdiction is vested in thie Court under 42 UCS 1983, 42 USC 1985(3), 42 USC 1986, 28 USC 1331, and 18 USC 1343(a)(4). The Court has state pendent jurisdiction under 28 USC 1367 and A.R.S. 12-821.

2. Venue is proper as all acts alleged herein occurred within the State of Arizona.

II
PARTIES

3. Plaintiffs Dennis M. Gutenkauf and Daniel A. Gutenkauf are and were at all times relevant to this complaint, both citizens of the United States of America, and residents of Maricopa County, Arizona. Plaintiffs are and were at all times relevant, members of a protected class, registered voters.

4. The Defendants Maricopa County, the Maricopa County Board of Supervisors, and Maricopa County

Elections are political subdivisions of the State of Arizona, and are being sued as "persons".

5. The defendants Karen Osborne, Linda Weedon, Rose Yera,Dora Rhodes, Carol Schlief, Patsy Wolfe, Willard Gentry. Allen Harding, Virginia Harding, Albert Padberg, Alicia Valenzuela,James Patrick Delaney Jr., and Scott Liddle, were at all times acting as agents and/or servants and/or employees of Maricopa County Elections, acting within the scope of their duties, and acting under color of state law, in their individual and official capacities.

6. The defendant Helen Purcell was at all times acting as anagent and/or servant and/or employee of Maricopa County Elections,acting within the scope of her duties, and acting under color of state law, in her individual and official capacity as Maricopa County Recorder.

7. The defendants Ed King, Tom Rawles, Don Stapley, Betsey Bayless, and Mary Rose Wilcox were at all times acting as agentsand/or servants and/or employees of the Maricopa County Board of Supervisors, acting within the scope of their duties, and acting under color of state law, in their individual and official capacities.

8. The defendants Margaret J. Stears, Linda Weedon, Sharon R. Keene-Wright, Patricia L. Wall, and Eryn McCarthy were at all times acting as agents and/or servants and/or employees of theElections Training Advisory Committee, acting within the scope of their duties, acting under color of state law, and in their individual capacities.

9. The defendant Jane Dee Hull was at all times acting under color of state law, and acting under color of office of Secretary of State of Arizona, in her individual capacity.

10. The defendant Lisa K. Daniel was at all times acting as agent and/or servant and/or employee of the Secretary of State of Arizona, acting under color of state law, and acting under color of office of Election Services Director, in her individual capacity.

11. The defendants Leroy Betts and Randall Wilson were at all times acting as agents and/or servants and/or employees of the Tempe Police Department, acting under color of state law, acting within the scope of their duties, and in their individual and official capacities as police officers.

III
NATURE OF THE CASE

12. The Plaintiffs bring this action under 42 USC 1983, 1985(3) and 1986 to obtain monetary damages from the assault and infliction of mental distress by Maricopa County Election workers. The Plainiffs were intimidated and threatened while exercising their elective franchise. Under color of state law, the voters were denied their right to access public records and observe the vote count, rights protected by the First and Fourteenth Amendments to the U.S. Constitution. These rights were violated with reckless disregard for clearly established law. (See U.S. v Mosley 238 U.S. 383)

IV
FACTS

13. On November 5,1996, Dennis Gutenkauf voted in the presidential election at around 5:00 p.m. and immediately left the polling place thereafter. The location was Arbour Park Apartments, 1901 E. Apache Blvd., Tempe, Arizona (Precinct 19).

14. Dan Gutenkauf entered the same polling place to vote, sometime before 7:00 p.m.

15. As he picked up a blank ballot, Dan Gutenkauf informed election marshal Willard Gentry and election inspector Allen Harding that he intended to monitor the vote count, after the polls were closed.

16. Dan Gutenkauf provided a memorandum of A.R.S. 16-601 (tally of vote) and Attorney General Opinion # 64-40-L for the election workers to review, while he was voting.

17. As Dan Gutenkauf turned in his completed ballot, an election worker announced that it was 7 o'clock and the polls were now closed.

18. Without articulating any reasonable suspicion, or probable cause, elections clerk James Patrick Delaney Jr. asked Dan Gutenkauf for permission to search for weapons.

19. Dan Gutenkauf consented to the search, because he feared he would be denied the right to stay, if he refused the search.

20. During the search, Dan Gutenkauf showed election workers a tape

recorder, and told them he was recording the conversation.

21. Dan Gutenkauf then told election workers that his brother, who was outside, also wanted to observe the vote count, pursuant to the public records statute.

22. Dennis Gutenkauf entered the polling place with a carry bag, containing a small videocamera, but he was not searched for weapons.

23. Dan Gutenkauf asked inspector Allen Harding for permission to videotape the vote count. Allen Harding objected to the request, and said he was waiting for a troubleshooter for advice on the Plaintiffs' right to be there.

24. While waiting for the troubleshooter, Allen Harding called the Tempe Police Department.

25. Police officers Leroy Betts and Randall Wilson arrived, and they began to investigate the situation.

26. Dan Gutenkauf told Officer Betts that he was exercising his right to observe the vote count, and then read the memorandum of law.

27. Dan Gutenkauf stated that, as a campaign worker for Pat Buchanan, he observed irregularities, and was concerned about the vote fraud documented by "Votescam" author James Collier.

28. Dan Gutenkauf then quoted A.R.S. 39-121, the public records statute, and asserted his right to be there.

29. When troubleshooter Scott Liddle arrived, he asked what was going on. Officer Betts told the troubleshooter that the Plaintiffs wanted to observe the vote count.

30. Scott Liddle said "They don't count anything here." He then demanded to see a letter of authorization.

31. Dan Gutenkauf told Mr. Liddle that a letter of authorization isn't required to observe the vote count, and read the Attorney General Opinion to Mr. Liddle.

32. Scott Liddle interrupted and said "I don't care about the Attorney General Opinion, I just want to see the law."

33. Dan Gutenkauf then read A.R.S. 16-601 (tally of vote) to Scott Liddle, and said "I'm here as a member of the public to monitor the vote count."

34. Uncertain of the law, Allen Harding started quibbling about the secondary issue of the voters wanting to videotape.

35. The troubleshooter then called the election hotline to ask if the Plaintiffs had a right to be there. The hotline worker told him "no".

36. The troubleshooter then told the voters, Dennis and Dan Gutenkauf, that "you need to leave right now, or I will call the sheriff, and he will remove you."

37. Dan Gutenkauf asked the troubleshooter for the supervisor's name. Mr. Liddle replied, "the hotline...the board of elections people."

38. Dennis Gutenkauf advised Mr. Liddle that it is illegal to impair or hinder the availabilty of a public record. Scott Liddle replied,"I was told by my supervisors to remove you. If you'd like to wait around for them, they'd be glad to do it for me."

39. Out of fear of false arrest,

and possible excessive force, Dennis and Dan Gutenkauf left the polling place.

40. As the Plaintiffs walked to their cars, Officers Betts and Wilson detained them to make out a police report of the incident.

41. Dennis Gutenkauf told the officers that he was considering legal action for deprivation of rights, and maybe referring the matter to Grant Woods.

42. Dennis and Dan Gutenkauf then drove to the counting center, and related the incident to Karen Osborne.

43. The Plaintiffs filed a notice of claim with the county risk management, but received no response after 60 days. County Attorney Richard Romley, to the Plaintiffs' knowledge, did not prosecute any election workers for their violation of state law.

V
LEGAL CLAIMS

44. The facts related above, show that the Elections workers, acting in concert, under color of state law, caused the duly qualified voters to be subjected to the deprivation of Constitutionally protected rights, under the First, Fourth, and Fourteenth Amendments to the Constitution of the United States.

45. Maricopa County is liable for the damages and injuries sustained, based on several theories of accountability :

a) supervisory participation, by approving and ordering the assault

b) a custom of denying access to public records, when a citizen tries to

uncover evidence of voter fraud

c) a custom of acquiescence to voter fraud, by failure to prosecute violations of election law

d) a policy of deliberate indifference to voters rights, by making a conscious choice not to adequately train

46. The First Amendment protects the right to redress grievances and the right to access public documents.

47. The due process and equal protection clauses of the Fourteenth Amendment protect the voter's right to the vote count without dilution, and freedom from intimidation while exercising the right to vote.

48. The Fourth Amendment protects the right to be secure in one's person, and be free from bodily harm.

49. Dennis and Daniel Gutenkauf's Constitutionally protected rights were violated without a state's compelling interest.

FIRST CAUSE OF ACTION
ASSAULT

50. Plaintiffs Dennis and Daniel Gutenkauf reallege each and every averment in paragraphs 1 through 49 of this complaint, incorporating the same by reference, as if fully set forth herein.

51. Scott Liddle, intimidated Dennis and Dan Gutenkauf with the threat of physical force, and had the capacity to do so. Scott Liddle threatened to call the sheriff and have the voters removed from the polling place. Mr. Liddle made this threat with reckless disregard for clearly established law,

because Dan Gutenkauf read A.R.S. 16-601 to him, prior to the threat. (See A.R.S. 13-1202)

52. Mr. Liddle's supervisor, the elections hotline is liable for the assault, because of its participation, by approving and ordering the decision to have the voters removed.

53. Scott Liddle and the elections hotline, acting under color of state law, caused Dennis and Dan Gutenkauf to be deprived of their right to be secure in their persons, and free from bodily harm, as protected by the Fourth and Fourteenth Amendments to the U.S. Constitution.

54. The right of voters to be free from threats and intimidation is clearly established under state and federal law. (See A.R.S. 16-1013 et seq; See also U.S. v. Mosley 238 U.S. 383)

SECOND CAUSE OF ACTION
42 USC 1983 DEPRIVATION OF RIGHTS

56. Plaintiffs Dennis and Daniel Gutenkauf reallege each and every averment in paragraphs 1 through 49 of this complaint, incorporating the same by reference, as if fully set forth therein.

57. Each of the defendants named in this complaint took an oath to uphold the laws and Constitution of Arizona, and the Constitution of the United States. Acting under color of state law, each defendant has breached their duty to uphold that oath, and caused Dennis and Dan Gutenkauf to be subjected to the deprivation of their First, Fourth, and Fourteenth Amendment rights.

58. Jane Dee Hull, acting under

color of state law, and under color of office of Secretary of State, breached her duty under A.R.S. 16-407 (B), by issuing election officer certificates to persons who were not competent in election law.

59. Jane Dee Hull breached her duty under A.R.S 16-407(G) to outline the problems of the previous 2 years to the senate and house of representatives. A report on December 24, 1996, makes no mention of any problems with voter fraud, yet, she knew those problems existed, from information given to her by Patrick Walsh.

60. The report of December 24, 1996, makes no mention of the November 5, 1996 assault on the Plaintiffs, nor does it include a plan to the advisory training committee to focus training on election law, or voters rights (i.e. to observe the vote count).

61. The Chief State Election Director Lisa Daniel, was responsible for training, certification, and protecting the integrity of the electoral process. Acting under color of state law, Lisa Daniel breached her duty to recommend adequate training. She knew or should have known from the Shumway report about the inaccurate, outdated, and misleading training manuals.

62. In short, this breach of duty by Jane Dee Hull and Lisa Daniel, set into motion a series of events, that they should have reasonably forseen would result in the deprivation of Constitutionally protected rights. Acting under color of state law, their breach of duty, caused the Plaintiffs to be subjected to the deprivation of their

First, Fourth, and Fourteenth Amendment rights.

63. The Election Training Advisory Committee members, Margaret J. Stears, Sharon R. Keene-Wright, Eryn McCarthy, Linda Weedon, and Patricia L. Wall, each had a duty under A.R.S. 16-407 (F) to evaluate the form and content of all examinations in the curriculum proposed by Jane Dee Hull. The training advisory committee members, breached their duty to emphasize the legal aspects of elections in the training manual of the last 2 years, resulting in election workers at Precinct 19, who did not know election law. The breach of duty by the committee members, acting under color of state law, caused the Plaintiffs to be subjected to the deprivation of their constitutionally protected rights under the First, Fourth, and Fourteenth Amendments .

64. Maricopa County Supervisors Ed King, Tom Rawles, Don Stapley, Betsey Bayless, and Mary Rose Wilcox had a duty under A.R.S. 16-532 to conduct a class of instruction for election board members and tally board members on election laws. The November 5, 1996 Training Manual contained no instruction on the public's right to observe the vote count under A.R.S. 16-601. The breach of duty by the Maricopa County Board of Supervisors, acting under color of state law, caused the Plaintiffs to be subjected to the deprivation of their constitutionally protected rights under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution.

65. At a public forum at A.S.U. Memorial Union on November 5, 1997, Dan

Gutenkauf told Betsey Bayless about the denial of access to the vote count that occurred one year earlier. Betsey Bayless said that "if there was a violation of law, then somebody didn't get trained properly."

66. In the November 20, 1992 Phoenix Gazette, the Elections Department admitted there are constant problems with machinery and volunteer poll workers. Yet a 1996 pre-election flyer by Helen Purcell and Karen Osborne, states that elections clerks and marshals are not scheduled for a training class before the election. The Elections Department should have reasonably forseen that this would result in the deprivation of constitutional rights.

67. Acting under color of state law, the Elections Department made a conscious decision to not schedule training for election clerks and marshals, which resulted in an incompetent election marshal at Precinct 19, and caused the Plaintiffs to be subjected to the deprivation of their rights under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. If the election workers had received adequate training in election law and voters rights, the assault would not have occurred .

68. Scott Liddle knew that the voters had a right to access public records, and to observe the vote count, because Dan Gutenkauf read the statute A.R.S. 16-601, and had provided a memorandum of law for the election workers to review.

69. When Scott Liddle called the elections hotline and said that the

elections hotline and said that the voters were quoting statutes regarding their rights, the elections hotline never bothered to ask what those statutes were. This indicates that the order to deny the right of inspection was pursuant to a policy by the Elections Department, namely, to deny access of public records to anyone who attempts to uncover evidence of voter fraud.

70. After the 1996 Presidential primary election, "Votescam" author James Collier requested the names of 10 election workers, who purportedly checked voter i.d. numbers, after 60,000 duplicate voter i.d. cards were issued. Karen Osborne refused to give those names, which are a public record.

71. When James Collier requested the readout of the voter i.d. numbers that were punched into the computer, Karen Osborne, again, refused to allow access to a public record.

72. Libertarian Party chairman Ernie Hancock, who is also concerned about voter fraud, was denied the right to manually spot check ballots during the November 1994 election. Party officials in Pima County, however, were allowed to do several handcounts of ballots.

73. This policy of denying access of public records to those citizens who might uncover voter fraud, and the policy to not prosecute violators of election law, caused the Plaintiffs to be subjected to the deprivation of their First, Fourth, and Fourteenth Amendment rights, protected by the U.S. Constitution.

74. Scott Liddle and the elections

hotline knew or should have known that it is a violation of A.R.S. 16-1013 (A) to threaten or intimidate a voter, and that doing so would result in the deprivation of Constitutionally protected rights.

75. The supervisors at the elections hotline, approved and ordered the decision to have the Plaintiffs removed from the polling place.

76. As a direct and proximate result of the defendants actions, the Plaintiffs feared for their safety as they recalled the excessive force used by the sheriff's office in the Scott Norberg incident, in which he was strangled and killed.

77. Acting under color of state law, Scott Liddle and the elections hotline caused the Plaintiffs to be deprived of their right to:

a) be secure in their persons and be free from bodily harm, as protected by the Fourth and Fourteenth Amendments to the U.S Constitution,

b) redress grievances and access public records, as protected by the First and Fourteenth Amendments to the U.S. Constitution,

c) observe the vote count without dilution, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution.

THIRD CAUSE OF ACTION
42 USC 1985(3)
CONSPIRACY TO DEPRIVE RIGHTS

78. Plaintiffs Dennis and Daniel Gutenkauf reallege each and every averment in paragraphs 1 through 49 of

this complaint, incorporating the same by reference, as if fully set forth herein.

79. Allen Harding, Scott Liddle, and the elections hotline workers, acting in concert, and under color of state law, agreed to deprive Dennis and Dan Gutenkauf of equal protection of the law,by intentionally denying them the right to access public records and observe the vote count.

80. Troubleshooter Scott Liddle committed the overt act of threatening to call the sheriff, and have the voters removed from the polling place.

81. Dennis and Dan Gutenkauf are members of several protected classes: a) registered voters, b) Republicans, c) supporters of a political candidate, d) voters concerned with voter fraud and the dilution of the vote, e) members of the public monitoring government operations.

82. The supervisors at the elections hotline approved and ordered the decision to have the voters removed from the polling place, where the plaintiffs had a right to be, under the equal protection clause of the Fourteenth Amendment and the First Amendment to the U.S. Constitution .

83. The elections hotline workers Linda Weedon, Rose Yera, Carol Schlief, Dora Rhodes, and Patsy Wolfe knew or should have known that the order to remove the voters violated A.R.S. 16-1013 and would result in the deprivation of Constitutionally protected rights.

84. As a direct and proximate result of the defendants' actions, Allen Harding, Scott Liddle, and the elections hotline, caused Dennis and Dan Gutenkauf

to be deprived of their rights to:
a) be secure in their persons and be free from bodily harm, as protected by the Fourth and Fourteenth Amendments to the U.S Constitution,
b) redress grievances and access public records, as protected by the First and Fourteenth Amendments to the U.S. Constitution,
c) observe the vote count without dilution, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution.

FOURTH CAUSE OF ACTION
42 USC 1986
NEGLECT TO PREVENT CONSPIRACY

85. Plaintiffs Dennis and Daniel Gutenkauf reallege each and every averment in paragraphs 1 through 49 of this complaint, incorporating the same by reference, as if fully set forth therein.

86. Tempe police officers Leroy Betts and Randall Wilson had knowledge of Dennis and Dan Gutenkauf's right to access public records and observe the vote count, because Dan Gutenkauf read the statutes pertaining to both rights.

87. Officers Betts and Wilson also had knowledge of the agreement by Allen Harding, Scott Liddle, and the elections hotline to deny those rights, because they were present at the time of the incident.

88. Officers Betts and Wilson had knowledge of the order to have the voters removed, and the threat to call the sheriff.

89. Officers Betts and Wilson,

acting under color of state law, had the power and duty to arrest Allen Harding and Scott Liddle for violating A.R.S. 16-1013, but neglected to exercise that power to prevent the conspiracy against the voters' rights. By their failure to act, they aided and abetted the conspiracy, causing the voters to be subjected to the deprivation of their First, Fourth, and Fourteenth Amendment rights.

90. Election marshal Willard Gentry, had knowledge of the conspiracy, because he was present during the entire incident. With the authority of a constable, he had the power to make arrests, and the duty under A.R.S. 16-535(B) to permit no violation of election laws. By his neglect to perform his duty, while acting under color of state law, he caused the voters to be deprived of their rights guaranteed under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution.

91. Elections workers Virginia Harding, Alicia Valenzuela, Albert Padberg, and James Patrick Delaney Jr. had knowledge of the conspiracy, because they were all present at the time of the incident, and within hearing distance of the activity in the small room.

92. When James Patrick Delaney Jr. searched Dan Gutenkauf for weapons, Virginia Harding told Mr. Delaney to "suck off." When the voters were threatened and intimidated, each one of the other workers had the power to say the same thing - "suck off." In fact, each of the other workers took an oath to defend the Constitution against all enemies, yet, acting under color of

duty. This failure to act, caused the voters to be subjected to the deprivation of their rights guaranteed by the First, Fourth, and Fourteenth Amendments to the U.S. Constitution.

93. Each of the election workers knew or should have known that it is against clearly established law to threaten or intimidate a voter, and that such conduct would reasonably lead to the deprivation of constitutionally protected rights.

94. As a direct and proximate result the neglect of the police officers and election workers to prevent the conspiracy, Dennis and Dan Gutenkauf were deprived of their rights to:
a) be secure in their persons and be free from bodily harm, as protected by the Fourth and Fourteenth Amendments to the U.S Constitution,
b) redress grievances and access public records, as protected by the First and Fourteenth Amendments to the U.S. Constitution ,
c) observe the vote count without dilution, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution.

VI
FIFTH CAUSE OF ACTION
INFLICTION OF EMOTIONAL DISTRESS

95. Plaintiffs Dennis and Daniel Gutenkauf reallege each and every averment in paragraphs 1-49 of this complaint, incorporating the same by reference, as if fully set forth herein.

96. Elections inspector Allen Harding, called Tempe police to the

polling place, thereby subjecting the Plaintiffs to emotional distress out of fear of false arrest, and possible use of excessive force.

97. When the police arrived, the Plaintiffs had no idea of what Allen Harding may have said to the police over the phone. The Plaintiffs were conducting themselves peaceably, and were not in any way a threat to the health, safety, or welfare of the election workers. If Mr. Harding had been adequately trained in election law, he would have called upon the election marshal, not the Tempe police, or Troubleshooter Scott Liddle.

98. Troubleshooter Scott Liddle also subjected the Plaintiffs to emotional distress, when he threatened to call the sheriff, who would have them removed. The Plaintiffs experienced fear, nervousness, anxiety, embarrassment, humiliation, and shock over the fact that this could happen to a citizen exercising his constitutionally protected rights. The Plaintiffs could not keep from thinking of the Scott Norberg incident, which resulted in his strangulation and death.

99. The actions of defendants Allen Harding and Scott Liddle under color of state law, caused the voters Dennis and Dan Gutenkauf emotional distress out of fear for their safety, thereby causing the voters to be subjected to the deprivation of their rights to:

a) be secure in their persons and be free from bodily harm, as protected by the Fourth and Fourteenth Amendments to the U.S Constitution,

b) redress grievances and access public

b) redress grievances and access public records, as protected by the First and Fourteenth Amendments to the U.S. Constitution ,
c) observe the vote count without dilution, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution.

WHEREFORE, Plaintiffs Dennis and Dan Gutenkauf respectfully request that this Court award:

A. Trial by jury on all issues triable by jury,

B. Compensatory damages in the amount of no less than $50,000 per Plaintiff, per cause of action, to be paid in cash,

C. Reasonable fees and costs incurred,

D. Leave to amend complaint, pursuant to Fed.R.Civ.P.15(a), once discovery is completed,

E. Declaratory judgement that the defendants actions violated Plaintiffs constitutionally protected and statutory rights,

F. Such other relief as the court deems just, proper, and equitable.

RESPECTFULLY SUBMITTED this 26 day of February ,1998

Dennis M. Gutenkauf
Dennis M. Gutenkauf

Daniel A. Gutenkauf
Daniel A. Gutenkauf

c/o 1847 E. Apache Blvd. #41
Tempe, Arizona PZ 85281

VERIFICATION

I, Dennis M. Gutenkauf, declare and verify under the penalty of perjury under the laws of the United States of America that: I am the Plaintiff herein, that I have read the complaint, and it is true and correct to the best of my knowledge and belief.

Date 2/26/98

Dennis M. Gutenkauf

Dennis M. Gutenkauf

I, Daniel A. Gutenkauf, declare and verify under the penalty of perjury under the laws of the United States of America that: I am the Plaintiff herein, that I have read the complaint, and it is true and correct to the best of my knowledge and belief.

Date 2/26/98

Daniel A. Gutenkauf

Daniel A. Gutenkauf

STATUTORY PROVISIONS

Arizona Statutes

A.R.S. 16-601. Tally of Vote

As soon as the polls are closed and the last ballot has been deposited in the ballot box, the election board or the tally board shall immediately count the votes cast. The count shall be public, in the presence of bystanders, and shall be continued without adjournment until completed and the result determined and declared.

A.R.S. 16-603. Inspection of ballots by party representative

A mutually agreed upon number of representatives and alternates of each political party represented on the ballot by a party designation and column,appointed in the manner provided by ¶16-590, may remain inside the voting area from the time the polls are closed, and, without unduly hindering or delaying the count, one representative from each party at a time may inspect the ballots as they are read and the tally lists as they votes are tallied or counted, but the ballots and tally lists shall at all times remain under the personal charge and keeping of the election officers and shall not be permitted to pass from their hands.

A.R.S. 16-604. Count of votes cast; tally list

A. The election board or the tally board shall, after complying with ¶16-602, count the number of votes cast for each person voted for, and for and against each proposed constitutional

amendment and initiated or referred measure on the ballot.
B. Each clerk shall write on a tally list the titles of the offices to be filled, and underneath each title the names of the persons voted for to fill the office, and the number as given on the ballot of each proposed constitutional amendment and initiated or referred measure, and keep in the squares and lines opposite the names and numbers, respectively, the number of votes by tallies as the votes are read aloud.

A.R.S. 16-621. Proceedings at the counting center

A. All proceedings at the counting center shall be under the direction of the board of supervisors or other officer in charge of elections and shall be conducted in accordance with the approved instructions and procedures manual provided for in ¶16-452 under the observation of representatives of each political party and the public, but no persons except those authorized for the purpose shall touch any ballot or ballot card or return. All persons who are engaged in processing and counting of the ballots shall be deputized in writing and take an oath that they will faithfully perform their assigned duties. There shall be no preferential counting of ballots for the purpose of projecting the outcome of the election. If any ballot is damaged or defective so that it cannot properly be counted by the the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot in the presence of witnesses and substituted for the

damaged ballot. All duplicate ballots shall be clearly labeled "duplicate" and shall bear a serial number which shall be recorded on the damaged or defective ballot.
B. If for any reason it becomes impracticable to count all or part of the ballots with tabulating equipment, the officer in charge of elections may direct that they be counted manually, following as far as practicable the provisions governing the counting of paper ballots.

A.R.S. 16-1009. Failure or refusal to perfom duty by election officer; classification

A public officer upon whom a duty is imposed by this title, who knowingly fails or refuses to perform that duty in the manner prescribed by law, is guilty of a class 3 misdemeanor.

A.R.S. 16-1010. Refusal by election officer to perform duty; violation of election law; classification

A person charged with performance of any duty under any law relating to elections who knowingly refuses to perform such duty, or who, in his official capacity, knowingly acts in violation of any provision of such law, is guilty of a class 6 felony unless a different punishment for such act or omission is prescribed by law.

A.R.S. 16-1013. Coercion or intimidation of elector; classification

A. It is unlawful for a person knowingly:
1. Directly or indirectly, to make use of force, violence or restraint, or to

inflict or threaten infliction, by himself or through any other person, or any injury, damage, harm or loss, or in any manner to practice intimidation upon or against any person, in order to induce or compel such person to vote ore refrain from voting for a particular person or measure at any election provided by law, or on account of such person having voted or refrained from voting at an election.
2. By abduction, duress or any forcible or fraudulent device or contrivance whatever to impede, prevent or otherwise interfere with the free exercise of the elective franchise of any voter, or to compel, induce or to prevail upon a voter either to cast or refrain from casting his vote at an election, or to cast or refrain from casting his vote for any particular person or measure at an election.
B. A person, whether acting in his individual capacity or as an officer or agent of a corporation, who violates a provision of this section is guilty of a class 1 misdemeanor.

A.R.S. 16-535. Election marshal; appointment; powers and duties
A. The board of supervisors shall, at the time provided in ¶16-531, appoint a qualified voter of the precinct as election marshal.
B. The election marshal shall preserve order at the polls and permit no violation of the election laws and for that purpose is vested with powers of a constable from the opening of the polls until the count of the ballots is completed. The election marshal may perform the duties of any other election

board member on a relief basis.

A.R.S. 39-121.01 Copies; printouts or photographs of public records

A. In this article, unless the context otherwise requires:
1. "Officer" means any person elected or or appointed to hold any elective or appointive office of any public body and any chief administrative officer, officer, head, director, superintendent or chairman of any public body.
2. "Public body" means the state, any county, city, town, school district, political subdivision or tax supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by funds from the state or any political subdivision thereof, or expending funds provided by the state or any political subdivision thereof.
B. All officers and public bodies shall maintain all records reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by funds from the state or any political subdivision thereof.
C. Each public body shall be responsible for the preservation, maintenance and care of that body's public records and each officer shall be responsible for the preservation, maintenance, and care of that officer's public records. It shall be the duty of each such body to carefully secure, protect and preserve public records from deterioration,

mutilation, loss or destruction, unless disposed of pursuant to ¶¶41-1344, 41-1347 and 41-1351.
D. Subject to the provisions of ¶39-121.03:
1. Any person may request to examine or be furnished copies, printouts or photographs of any public record during during regular office hours. the custodian of such records shall furnish such copies, printouts or photographs and may charge a fee if the facilities are available, except that public records for purposes listed in ¶39-122 shall be furnished without charge.
2. I the custodian of a public record does not have the facilities for making copies, printouts or photographs of a publis record which a person has a right to inspect, such person shall be granted access to the public record for the purpose of making copies, printouts or photographs. The copies, printouts or photographs shall be made while the public record is in the possession, custody and control of the custodian thereof and shall be subject to the supervision of such custodian.

A.R.S. 38-446. Acts based on written opinions; immunity

Notwithstanding any provision of law to the contrary, no public officer or employee is personally liable for acts done in his official capacity in good faith reliance on written opinions of the attorney general issued pursuant to ¶41-193 or written opinions of a county attorney of the county or written opinions the city or town attorney of the city or town for which the officer or employee serves or is employed.

Attorney General Opinion No.64-40-L
R-157 October 1, 1964

REQUESTED BY: The Honorable Isabel Burgess

QUESTIONS:
1. If the chairman of the county central committee of the minority political party submits a list of qualified voters to the Board of Supervisors at least one week prior to appointment, is it mandatory that the Board of Supervisors appoint these minority party electors as election board and tally board workers ?

2. If the Board of Supervisors appoints a tally board pursuant to A.R.S.¶16-771, is it mandatory that the minority political party be represented on such tally board ?

3. May an election board or tally board member leave the polling place either while the polls are open or while the ballots are being counted ?

4. Once the polls are closed and the tally of ballots started, can the tally of ballots be continued from time to time, or must the tally be a continuous, uninterrupted procedure ?

5. Once the polls are closed and the tally of ballots commenced, who, besides election board and/or tallyboard members, marshal, and party representatives, is allowed inside the railing of the polling place ?

6. Must the election and tally boards be

a continuing board, or can it be operated in shifts ? Once a person serving on an election or tally board leaves the premises, can he then return and resume this duty ? Are new members of the election and tally boards permitted to come in to replace those who might wish to leave or be excused permanantly ?

ANSWERS:

1. Yes.
2. Yes.
3. No.
4. See body of Opinion
5. See body of Opinion
6. See body of Opinion

Regarding question no. 1 - the (Attorney General) has issued two recent opinions which are specifically in point: Opinion No. 62-23 of May 21,1962, and Opinion No. 64-35-L of September 22,1964. In summary of these opinions, it is mandatory that the Board of Supervisors appoint minority party electors to the election and tally boards when requested by the chairman of the county central committee of said minority political party, if said request is made within the statutory time period.

The cited opinions, supra, further indicate that the board must also have minority party representation if so requested by the particular county central committee. A.R.S. ¶16-771 states in part "...The tally board ...shall be appionted with the same qualifications and on the same basis as is set forth in this section." The rest of the section,

as pointed out in the first paragraph, does provide for said minority representation on the election board.

Since the same reasoning can be applied to both questions Nos. 3 and 4, as a matter of convenience we will answer them together. A.R.S.¶16-941 states:"As soon as the polls are closed and th last ballot has been deposited in the ballot box, the election board or the tally board shall immediately count the votes cast. The count shall be public, in the presence of bystanders, and shall be *continued without adjournment* until completed and the result determined and declared." (*Emphasis supplied)*. Thus, it is clear the counting of the ballots should be a continuous uninterrupted procedure and, by implication, tally board members, therefore, should not be permitted to leave the polling place during the count. Article VII, Section 12 of the Arizona Constitution states: "There shall be enacted registration and other laws to *secure the purity of elections and guard against abuses* of the elective franchise." (*Emphasis supplied*). We believe the faithful performance of a board members duties (A.R.S.¶16-773 (C)) to secure the purity of elections and to guard against election abuses could not be fulfilled if he were free to come and go from the polls at his whim or caprice. In light of the above Constitutional provision, it is the opinion of this office that neither nor tally board members should leave the polling place while the polls are open, unless for some emergency reason.

Regarding the fifth question, during the counting of the ballots

anyone should be allowed inside the railing of the polling place as long as he is properly conducting himself. A.R.S. ¶16-941 states:"...The count shall be public, in the presence of bystanders."

It appears to us that the intention of the legislature concerning elections is that the election and tally boards be a continuing board, and should therefore, not be operated in shifts. To operate the board in shifts would cause unnecessary confusion, general inefficiency in operation, and the probability that the boards may be understaffed by the departure of one shift member and the failure of his replacement to appear on time.

Having arrived at the opinion that board members should only leave the premises for emergency reasons, we must examine the specific reason for departure before answering the question of whether or not one who leaves the premises can return and resume his duties. A.R.S. ¶16-772 and A.R.S. ¶16-773 provide for the appointment of additional board members to fill vacancies. Thus, if one were to leave his poll for any reason, a replacement could and should be appointed. Surely if one left without an emergency reason, for personal business, etc., said individual should not be allowed to return and resume his duties. On the other hand, if merely a temporary replacement had been appointed to fill in during an emergency leave, upon returning, said original board member should be permitted to resume his duties.

The above discussion has also

answered the last part of the sixth question, that is, new members of the election and tally boards should be permitted to come in to replace those who might wish to leave or be excused permanently. A.R.S. ¶16-772, ¶16-773.

A.R.S. ¶13-2407 Tampering with a public record; classification

A. A person commits tampering with a public record if, with the intent to defraud or deceive, such person knowingly:

1. Makes or completes a written instrument, knowing that it has been falsely made, which purports to be a public record or true copy thereof or alters or makes a false entry in a written instrument which is a public record or a true copy of a public record; or

2. Presents or uses a written instrument which is or purports to be a public record or a copy of such public record, knowing that it has been falsely made, completed or altered or that a false entry has been made, with intent that it be taken as genuine; or

3. Records, registers or files or offers for recordation, registration or filing in a governmental office or agency a written statement which has been falsely made, completed or altered or in which a false entry has been made or which contains a false statement or false information; or

4. Destroys, mutilates, conceals, removes or otherwise impairs the availability of any public record; or

5. Refuses to deliver a public record in person's posssession upon proper request

of a public servant entitled to receive such record for examination or other purposes.
B. In this section "public record" means all official books, papers, written instruments or records created, issued, received or kept by any governmental office or agency or required by law to be kept by others for the information of the government.
C. Tampering with a public record is a class 6 felony.

Federal Statutes

42 USC ¶1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC ¶1985(3) Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire, or go in disguise

on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory fromm giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 USC ¶1986. Action for neglect to prevent conspiracy

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section

(42 USCS ¶1985), are about to be committed, and having power to prevent or aid in preventing the commision of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

CONSTITUTIONAL PROVISIONS

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteeenth Amendment Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.